(18,987.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 69.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY, INDIANA.

IN ERROR TO THE APPELLATE COURT OF THE STATE OF INDIANA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from White circuit court	2	1
Transcript from Pulaski circuit court	3	1
Caption	3	1
Order as to hearing application for injunction	3	1
Order refusing application for injunction	4	2
Order filing amended complaint	4	2
Order filing separate answer of Hathaway	5	2
Separate answer of Hathaway	5	3
Separate answer of McGuire	6	3
Affidavit for change of venue	6	3

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 6, 1904.

	Original.	Print
Change of venue granted	7	4
Appointment of special judge	7	4
Oath of special judge	8	5
Order filing separate answer of Dellinger	8	5
Separate answer of Dellinger	9	5
Order setting cause for trial	9	6
Order withdrawing answers, &c.	10	6
Motion to make complaint more specific	10	6
Ruling on motion	11	7
Amended complaint	11	7
Exhibit A—Plat	21*a*	12
Motion to make amended complaint more specific	22	13
Ruling on motion	22	13
Order beginning hearing	22	13
Order filing bill of exceptions No. 1	23	14
Bill of exceptions No. 1	23	14
Motion to make more specific	24	14
Judge's certificate to bill of exceptions	25	15
Submission of cause	25	15
Order filing findings of fact and conclusions of law	25	15
Finding of facts	26	15
Conclusion of law	37	23
Exhibit to findings—Plat	38*b*	23
Judgment	39	24
Order granting leave to file motion for new trial	39	24
Defendants' motion for new trial	39	24
Bond on motion for new trial	40	24
New trial granted, &c	41	25
Order setting cause for hearing, &c	41	25
Order filing affidavit for change of venue	42	26
Affidavit for change of venue	42	26
Answers withdrawn, &c	43	27
Demurrer of Hathaway	43	27
Affidavit of Medary M. Hathaway	43	27
Order for change of venue to White circuit court	45	28
Certificate of clerk of Pulaski circuit court	45	28
Appointment of special judge	46	29
Demurrer withdrawn and answer filed	47	29
Answer	47	30
Order to publish depositions	49	31
Second trial begun	49	31
Order directing verdict	50	32
Verdict	51	32
Plaintiff's motion for new trial	51	33
Order overruling motion for new trial	53	34
Judgment	53	34
Order allowing appeal, &c	53	34
Order filing appeal bond	53	34
Appeal bond	54	35
Order filing transcript of evidence	55	35

	Original.	Print
Order filing bill of exceptions	55	35
General bill of exceptions	56	36
Index to evidence	60	37
Plat offered	62	38
Exhibit A—Plat	62½	39
Decree of foreclosure offered	63	40
Exhibit B—Decree of foreclosure in case of Charles E. Bill *vs.* Louisville, New Albany and Chicago Railway Company *et al*	63	40
Deed (Record No. 30) offered	71	44
Deed from John D. Howland, special commissioner, to George F. Talman *et al.*, December 27, 1872	71	44
Article of association offered	76	47
Exhibit C—Articles of association of the Louisville, New Albany and Chicago Railway Company	76	47
Articles of consolidation offered	82	50
Exhibit D—Articles of consolidation of the Louisville, New Albany and Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company	82	51
Mortgage (Record No. 25) offered	93	56
Deed of trust from the Louisville, New Albany and Chicago Railway Company to the Farmers' Loan and Trust Company and John H. Barker, January 1, 1886	93	57
Mortgage offered	118	71
Exhibit E—Deed of trust from the Louisville, New Albany and Chicago Railway Company to the Central Trust Company of New York and John H. Stotsenburg, May 1, 1890	118	71
Mortgage offered	156	94
Deed of trust from the Louisville, New Albany and Chicago Railway Company to the Central Trust Company of New York and James Murdock, September 1, 1894	157	94
Decree of foreclosure offered	192	115
Exhibit F—Decree of foreclosure in the case of The Farmers' Loan and Trust Company and John H. Baker *vs.* The Louisville, New Albany and Chicago Railway Company *et al*	192	116
Special master's report offered	223	134
Exhibit G—Special master's final report in case of The Farmers' Loan and Trust Company and John H. Barker *vs.* The Louisville, New Albany and Chicago Railway Company *et al*	223	134
Schedule A—Statement showing the method of ascertainment of dividend value of outstanding bonds	226	136
Supplemental report	227	137
Order confirming reports	228	138
Clerk's and judge's certificate	229	138
Special master's deed offered	230	139

	Original	Print
Exhibit H—Deed from Wm. A. Van Buren, special master, to Frederic P. Olcott *et al.*, committee of bondholders, March 19, 1897	230	139
Deed of Olcott *et al.* offered	238	144
Exhibit I—Deed from Frederic P. Olcott *et al.* to The Chicago, Indianapolis and Louisville Railway Company, March 31, 1897	239	144
Articles of association offered	248	149
Exhibit J—Articles of association of The Chicago, Indianapolis and Louisville Railway Company	248	149
Deed of James C. Brooks offered	257	155
Exhibit K—Deed from James C. Brooks *et ux.* to The Louisville, New Albany and Chicago Railway Company, February 20, 1896	257	155
Deposition of Hayworth offered	261	157
Deposition of James N. Hayworth	262	157
Exhibit A—Schedule for 1897	275	166
B—Schedule for 1896	276	166
C—Schedule for 1895	277	167
D—Schedule for 1894	278	167
E—Schedule for 1893	279	167
F—Schedule for 1892	280	168
G—Schedule for 1891	281	168
H—Schedule for 1890	282	168
I—Schedule for 1889	283	169
Testimony of Samuel Petrie	286	169
Exhibit L—Photograph	295*a*	176
M—Photograph	297*a*	177
Testimony of Robert Field	300	179
Plat offered	303	180
Plaintiff rests	303	181
Admission as to offers	304	181
Offers by defendants	304	181
Exhibit N—Amended complaint in McGuire *vs.* L., N. A. & C. Ry. Co	304	181
Admission as to answer in McGuire *vs.* L., N. A. & C. Ry. Co	313	186
Order of submission in McGuire *vs.* L., N. A. & C. Ry. Co	314	187
Special findings in McGuire *vs.* L., N. A. & C. Ry. Co	315	187
Judgment in McGuire *vs.* L., N. A. & C. Ry. Co.	326	194
Execution offered	328	195
Exhibit O—Execution to sheriff of Pulaski county in McGuire *vs.* L., N. A. & C. Ry. Co	328	195
Sheriff's return	329	196
Notice of sheriff's sale	336	200
Appraisement	340	202
Sheriff's deed offered	343	204
Exhibit P—Deed from Philip Dellinger, sheriff, to Medary M. Hathaway, November 22, 1898	344	205

	Original.	Print
Transcript of judgment offered	351	209
Exhibit Q—Transcript of judgment in case of McGuire *vs.* Louisville, New Albany and Chicago Railway Company	351	209
Execution docket offered	368	217
Execution docket in McGuire *vs.* L., N. A. & C. Ry. Co.	368	217
Testimony of Medary Hathaway	381	225
Exhibit T—Map of depot grounds	404*a*	240
Testimony of Edmund H. Applegate	404	241
Defendants rest	405	241
Plaintiff offers in rebuttal	405	241
Lease to Prewett offered	405	241
Exhibit R—Deed of lease from the Louisville, New Albany & Chicago Railway Company to J. H. Prewett, April 18, 1893	405	242
Lease to Myers offered	409	243
Exhibit S—Deed of lease from the Chicago, Indianapolis and Louisville Railway Company to Jacob Myers, July 1, 1897	409	244
Plaintiff rests	412	246
Defendants rest	412	246
Certificate of reporter	413	246
Clerk's certificate as to filing evidence	414	246
Judge's certificate to evidence	415	247
Judge's certificate to bill of exceptions	416	247
Clerk's certificate to transcript	417	247
Assignment of errors	419	248
Order submitting cause	420	249
Order filing brief of appellant	420	249
Order filing motion to dismiss	420	249
Order filing answer to motion to dismiss	420	249
Order filing application to amend assignment of errors	420	249
Order filing reply brief of appellees on motion to dismiss	420	249
Order overruling motion to dismiss	421	249
Order filing brief of appellees	421	249
Order filing reply brief of appellant	421	249
Order filing petition for oral argument	421	250
Order transferring cause to appellate court	421	250
Order setting cause for oral argument	421	250
Opinion of Henley, J	423	250
Judgment	424	252
Order filing petition and brief for rehearing	424	253
Order filing brief of appellees on petition	424	253
Order filing motion to strike petition from files	424	253
Order overruling petition for rehearing	424	253
Order filing petition for writ of error	425	253
Petition for writ of error	426	253
Allowance of writ of error	433	258
Order filing writ of error	435	258
Writ of error	436	258
Order filing bond on writ of error	437	259

	Original.	Print
Bond on writ of error	438	259
Order filing citation	440	260
Citation and service	441	261
Order filing assignment of errors	443	262
Assignment of errors	444	262
Clerk's certificate	448	264
Stipulation for addition to record	449	264
Order filing petition to transfer to Supreme Court for decision	450	265
Order filing answer to petition to transfer to Supreme Court for decision	450	265
Order denying petition to transfer to Supreme Court for decision	450	265
Clerk's certificate	451	265

1 THE STATE OF INDIANA:

In the Supreme Court.

Be it remembered, that heretofore, to-wit: on the 12th day of August, 1899, the same being the 72nd judicial day of the May term 1899 of said court, The Chicago, Indianapolis and Louisville Railway Company, by E. C. Field, G. W. Kretzinger, W. S. Kinnan, and Sellers and Uhl, its counsel, filed in the office of the clerk of the supreme court of Indiana a transcript of the record and proceedings of the White circuit court of said State, in a cause wherein The Chicago, Indianapolis and Louisville Railway Company was defendant, together with an assignment of errors endorsed thereon; which transcript and assignment of errors is in the words and figures following, to-wit; said transcript being filed as an appeal in term:

2 A transcript of the proceedings had in the White circuit court of Indiana in the case of The Chicago, Indianapolis and Louisville Railway Company *vs.* Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, sheriff of Pulaski county, Indiana.

3 Be it remembered, that on November 23rd, 1898, the clerk of the Pulaski circuit court of Indiana, filed in the office of the clerk of the White circuit court of Indiana, a certified transcript of the proceedings had in said Pulaski circuit court, together with the papers filed in the case of, The Chicago, Indianapolis and Louisville Railway Company, *vs.* Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, sheriff of Pulaski county, Indiana, which transcript and papers read as follows, towit:

"Be it remembered, that at a term of the circuit court of Pulaski county, Indiana, begun and held at the court house in the city of Winamac, in said county, commencing on the second Monday being the 8th day of November 1897, said term being held in pursuance of law, present the Hon. George W. Beeman, sole judge of said court, John C. Jones clerk thereof, and Phillip Dellinger sheriff of said county, and on the 1st judicial day thereof, being Nov. 8th, 1897, present the judge and officers aforesaid, the following proceedings were had by said court in the cause of—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

Comes now the plaintiff, by E. C. Fields, its attorney, and each of the defendants appear- by Steis & Hathaway, and M. Winfield, their

attorneys, and by agreement of the parties hereto, the hearing of this cause on the application for a temporary restraining order, is set for hearing at Knox, Starke county, Indiana, on Friday, November 12th, 1897, at 1.30 p. m. and all entries, orders and decrees made therein shall have the same force and effect, as if entered in term time, in the circuit court of Pulaski county.

4

And afterwards, to wit:—on the 23rd day of November, the same being the 14th judicial day of the November term, 1897, of the Pulaski circuit court, when the following proceedings were had and entered of record in Order Book 23 page 36 & 37, and is in the words and figures following, towit:—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

This order was made at Knox, Ind., Nov. 12th, 1897.

Come now the parties by counsel, and the cause is now submitted to the court for hearing on the petition for a temporary restraining order and the court being advised, finds that the plaintiff is not entitled to the injunction prayed for and the same is hereby refused.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE ET AL.

Comes now the plaintiff, by counsel, and files its amended complaint, making M. M. Hathaway a party defendant, said complaint being in the words and figures following, (this amended complaint shows that it was again filed on January 26th 1898, as an "amended complaint in two paragraphs," and the same will be set out in the transcript under that date.)

5

And afterwards, towit:—on the 1st day of December, the same being the 21st judicial day of the November term, 1897, of the Pulaski circuit court, when the following proceedings were had and entered of record in Order Book 23, page 64 and in the words and figures following, towit:—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana, and M. M. Hathaway.

Come now the parties, and M. M. Hathaway appears and files separate answer to amended complaint in the words and figures following:—

STATE OF INDIANA, } ss:
County of Pulaski, }

In the Pulaski Circuit Court, Nov. Term, 1897.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE Railway Company
vs.
PATRICK MCGUIRE and MEDARY M. HATHAWAY.
} Separate Answer of Hathaway.

Medary M. Hathaway, a defendant in above entitled cause, for separate answer to complaint of plaintiff as amended, denies each and every material allegation therein made and contained.

M. WINFIELD &
STEIS & HATHAWAY,
Att's for Def't Hathaway.

And the defendant McGuire files separate answer to the amended complaint, in the words and figures following:—

6 STATE OF INDIANA, } ss:
Pulaski County, }

In Pulaski Circuit Court, Nov. Term, 1897.

CHICAGO, INDIANAPOLIS & LOUISVILLE R. R. Co.
vs.
PATRICK MCGUIRE, MENT M. HATHAWAY.

The defendant Patrick McGuire separately for himself herein for answer to the plaintiff's amended complaint, denies each and every material allegation therein made and contained.

WINFIELD & SPENCER,
STEIS & HATHAWAY,
Att'ys for Def.

And plaintiff now files affidavit for change of venue from the court, said affidavit being in the words and figures following:—

STATE OF INDIANA, } ss:
Pulaski County, }

In the Pulaski Circuit Court, before the Hon. George Beeman, Judge.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE and Others.

Elisha C. Field being first duly sworn on oath says that he is the general solicitor of the plaintiff in the above entitled cause and by its authority and under its direction makes this affidavit in its behalf: Affiant says that the plaintiff cannot have a fair and impartial trial of said cause before the Hon. George Beeman, judge of said court for the reason that said judge is prejudiced against the plaintiff and its cause of action herein; that said facts are true as affiant is informed and verily believes.

Wherefore a change of venue is prayed from said judge.

ELISHA C. FIELD.

STATE OF ILLINOIS, } ss:
Cook County, }

Subscribed and sworn to before me this 18th day of November 1897. Witness my hand and seal.

[L. S.]

WM. S. KINNAN,
Notary Public.

which change is granted by the court, and the Honorable John E. Cass, is hereby appointed special judge to try and determine said cause.

And afterwards, towit:—on the 7th day of December, the same being the 26th judicial day of the November term 1897, of the Pulaski circuit court when the following proceedings were had and entered of record in Order Book 23, page 73 & '4 and is in the words and figures, towit:

Comes now Honorable John E. Cass, and presents his appointment as special judge to try cause No. 4991, and subscribes to the legal oath, said appointment and oath being in the words and figures following, towit:—

In the Pulaski Circuit Court, Pulaski County, Indiana, November Term, 1897.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
against
PATRICK MCGUIRE and PHILLIP DELLINGER, Sheriff.

I, George W. Beeman, judge of said court, having been disqualified to try said cause by reason of granting a change of venue
8 from the court on the application of the plaintiff, hereby appoints Hon. John E. Cass, a competent and disinterested attorney of said court, as special judge thereof in said cause to try and determine the same.

GEORGE W. BEEMAN,
Judge Pulaski Circuit Court.

Dec. 3rd, 1897.

THE STATE OF INDIANA, *County of Pulaski,* } *sct:*

I, John E. Cass, swear that I will support the Constitution of the United States and of the State of Indiana, and faithfully discharge my duties as judge of the Pulaski circuit court in case of Chicago, Indianapolis & Louisville Ry. Co. against Patrick McGuire, *et al.* So help me God.

JOHN E. CASS.

Subscribed and sworn to this 7th day of Dec. 1897, before me clerk of said court.

JOHN C. JONES, *Clerk.*

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE, PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana, and M. M. Hathaway.

Come now the parties, and the defendant Phillip Dellinger, files separate answer to complaint, in the words and figures following:—

9 STATE OF INDIANA, *Pulaski County,* } *ss:*

In Pulaski Circuit Court, Nov. Term, 1897.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE ET AL.

The defendant Phillip Dellinger, sheriff of Pulaski county, Indiana, for a separate answer for himself to the plaintiff's complaint

herein denies each and every material allegation therein made and contained.

WINFIELD, STEIS & HATHAWAY,
Att'ys for Def'ts.

And now by agreement of the parties this cause is continued and set down for trial, on the first Wednesday of the January term 1898, of this court, the same being the 26th day of January 1898.

JOHN E. CASS,
Special Judge.

And afterwards, to wit:—on the 26th day of January, the same being the 3rd judicial day of the January term 1898, of the Pulaski circuit court, when the following proceedings were had and entered of record in Order Book 23, page 119 and in the following words and figures, to wit:—

10 CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY Company
vs.
PATRICK MCGUIRE, PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana, and M. M. Hathaway.

Come the parties in person and by counsel, and each defendant asks and obtains leave to withdraw their answers heretofore filed, and thereupon each defendant separately and severally file a motion to make the complaint more specific, which motion is in these words:

STATE OF INDIANA, } ss:
Pulaski County, }

In Pulaski Circuit Court, Jan. Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, Sheriff.

Come now the defendants and separately and severally move the court to require the plaintiff to make its amended complaint more specific in this, towit:

First. That the plaintiff be required to allege and show in the complaint, the interest the plaintiff has in the real estate described in the complaint.

Second. That the plaintiff be required to allege what interest and title the said M. H. Allison had in the land described in the complaint, at the time the said Allison platted or pretended to plat the land described in the complaint.

M. WINFIELD,
SPENCER & STEIS & HATHAWAY.

11 Which motion is sustained as to the first cause assigned in said motion and overruled as to the second cause therein assigned, and thereupon the plaintiff files amended complaint in two paragraphs, which is in these words:—

STATE OF INDIANA, } ss:
Pulaski County, }

In Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS & LOUISVILLE R. R. Co.
vs.
PATRICK McGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

The plaintiff complains of the defendants and says that it is the owner in fee simple of the following described real estate situated in the county of Pulaski and State of Indiana, towit:—

A piece or tract of land beginning at the south-west corner of Yellow and Bill streets in the town or village of Francesville, Pulaski county, Indiana, thence south along the west line of said Bill street to the north line of Sherman avenue, thence west with said north line of Sherman avenue a distance of one hundred and fifty feet (150 ft.), thence north parallel with said west line of Bill street to the south line of Yellow street, thence east with the south line of Yellow street a distance of one hundred and fifty (150) feet to the place of beginning.

Said piece or parcel of land being the same described in a certain plat dedicated by one Allison in March, 1862, and acknowledged and recorded in the office of the recorder of Pulaski county,
12 Indiana, April 8th, 1862.

That the defendants set up and assert some title, claim or interest in the said described real estate which constitutes a cloud upon plaintiff's title, and the plaintiff prays a decree quieting its said title, and that the defendants be enjoined from setting up or asserting any title, claim or interest therein.

FIELD & NYE &
GEORGE W. KRETZINGER,
Att'ys for Pl'ff.

STATE OF INDIANA, } ss:
Pulaski County, }

In the Pulaski Circuit Court, November Term, 1897.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, Sheriff Pulaski County.

The plaintiff for a 2nd & further ground of complaint says that it is the owner of an easement in & to the following described real

estate situated in the said county of Pulaski, in the State of Indiana, described as follows, to-wit:

Beginning at the south west corner of Yellow and Bill streets in the town or village of Francesville, Pulaski county, Indiana, thence south along the west line of said Bill street to the north line of Sherman avenue, thence west with said north line of Sherman avenue a distance of 150 feet, thence north parallel with said west line of Bill street to the south line of Yellow street, thence east with the south line of Yellow street a distance of 150 feet, to the place of beginning
13 said piece or parcel of land being the same platted and dedicated for depot grounds by one Allison in March, 1862, and duly acknowledged and recorded in the recorder's office of Pulaski county, April 8th 1862.

And the plaintiff avers that on and prior to the year 1862 the Louisville, New Albany & Chicago Railroad Company, a corporation organized and existing under Indiana law, owned and operated a railroad in and through the county of Pulaski, in the State of Indiana, and through the town and village of Francesville, in said county; that said railroad was located and ran through the said piece or parcel of land hereinbefore described, or through a strip of land adjacent and adjoining the said hereinbefore described piece of land; that in March 1862, one M. H. Allison duly made, acknowledged and recorded in the recorder's office of Pulaski county, a plat sub-dividing certain lots, including the land hereinbefore described, into blocks, lots and depot grounds, and the same was recorded in the recorder's office of said county, April 8th, 1862, a copy of which plat is attached hereto and made a part hereof marked "Exhibit A;" that at the time of the making, acknowledging and recording of said plat there was no other railroad running into or through said town or village of Francesville than the railroad hereinbefore referred to, and no railroad has at any time since plat was made and recorded run into or through said town or village of Francesville, or near thereto, and the said plat was made and recorded for the purpose of dedicating the said strip of ground, designated thereon as "depot grounds" for the purpose of vesting the title and possession thereof in the said Louisville, New Albany & Chicago Railroad Company; that said railroad company at the time of said dedication had erected its depot building on said ground designated in said plat as "depot grounds," and entered into possession of said
14 described strip of land, and has from time to time since said date made other improvements thereon for the purpose of better facilitating its business, such as stock pens, tool house, side track, etc., and said railroad company from said date continued to occupy and possess said strip of land, claiming the title thereto, and its possession was continuous, uninterrupted, adverse and undisturbed until the year 1872, when the railroad property and franchises, including said strip of ground, was foreclosed in a court of competent jurisdiction and sold under a decree to the Louisville, New Albany & Chicago Railway Company, a corporation organized under Indiana

law, and took title thereto under such foreclosure and sale; and under said proceedings said railway company became the owner thereof and entered into possession and continued to operate the railroads theretofore belonging to the Louisville, New Albany & Chicago Railroad Company, and to exercise its franchises, and also took possession of said strip of land, and held the peaceable, continuous, uninterrupted and adverse possession thereof, claiming the title thereto, until the year 1881; that in the year 1881 the said railroad company consolidated with another Indiana company and an Illinois company, existing respectively under the laws of the States of Indiana and Illinois, and the company created by such consolidation took the name of the Louisville, New Albany & Chicago Railway Company; and thereupon the consolidated company entered into possession of the railroads, railroad property and franchises and real estate, including the strip of ground hereinbefore described, of each of said constituent companies, and continued in the peaceable, uninterrupted and adverse possession thereof, claiming the title thereto, until the 24th day of August, 1896; that on the 1st day of January, 1886, said railway company, created by said consolidation, executed its trust deed or mortgage to secure an issue of bonds, conveying to the Farmers' Loan & Trust Company and John H. Baker, as trustees, all of said railroad properties and franchises described in said mortgage as follows, to-wit:—

"All of the railway of the party of the first part in the city of Louisville, in the State of Kentucky, and extending from New Albany, on the Ohio river, to Michigan City in the State of Indiana, and from the city of Chicago, in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to the city of Indianapolis, in the State of Indiana, including the railway lying and being in all of said cities and terminal rights and facilities and approaches thereto the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the State of Indiana, and Jefferson county in said State of Kentucky, and Cook county in said State of Illinois, and also all branches thereof, including all the property of every sort or nature now owned by said railway company, and all that it may in the future acquire for the purposes and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal wood, and supplies of every kind belonging or appertaining to the railway company also all the tolls, incomes, issues and profits, arising out of the said property, and all the rights to receive and recover

the same, also all estate, right, title and interest of the party of the first part in and to any and all real estate belonging to the said party of the first part, also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents, that the said railway company shall and doth convey to the said trustees, all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may at any time hereafter during the continuance of this trust be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described; and also all choses in action, of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind or description, real, personal or mixed, and wherever the same may be situate, that may at any time before or after the date of this indenture be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways; all of which it is hereby covenanted shall inure by way of accretion to the benefit and advantage of said trustees, and by way of further and better security."

17

That afterwards, to-wit: on May 1st, 1890, said railway company created by said consolidation, also executed a deed or mortgage to the Central Trust Company, of New York, and John B. Stotsenberg, as trustees, to secure an issue of bonds, conveying to said trustees all of the railroad property and franchises of said railway company under description like in form and effect with that contained in the description hereinbefore set out under the deed of trust or mortgage to the Farmers' Loan & Trust Company of New York, and John H. Baker, trustees; that afterwards, towit, on the 1st day of September, 1894, said railway company, created by said consolidation, also executed to the Central Trust Company of New York and James Murdock, as trustees, to secure an issue of bonds thereunder conveying to said trustees all of its railroad, railroad property and franchises and real estate, including the strip of land hereinbefore described, for depot purposes, under a description like in form and effect with that heretofore set out under the trust deed to the Farmers' Loan & Trust Company, of New York, and John H. Baker, trustees; that said three trust deeds or mortgages were duly acknowledged and recorded in the said county of Pulaski, Indiana, and the other counties in Indiana through which said railroad or railroads ran; that on August 24th, 1896, one John T. Mills, Jr. filed his creditors' bill upon a judgment theretofore obtained by him against the Louis-

ville, New Albany & Chicago Railway Company in the circuit court of the United States for the district of Indiana; and William H. McDoel was on said day appointed receiver in said suit; and such receiver was ordered by said court to enter into legal possession of the railroad and all of the property and effects
18 real, personal and moxed, of the said Louisville, New Albany & Chicago Railway Company; and said receiver did under such order on said date accordingly take possession thereof, including the strip of land hereinbefore described as depot grounds, and from said date until the 1st day of July 1897, continued in the peaceable, uninterrupted and adverse possession thereof, claiming the title thereto; that in November 1896, the Central Trust Company of New York and John H. Stotsenburg, trustees, and the Farmers' Trust & Loan Company and John H. Baker, trustees, filed their several bills in said circuit court of the United States and foreclosed said trust deeds or mortgages by reason of default in payment of the interest, and by the judgment and decree of said court William H. McDoel was also appointed receiver in said foreclosure suits; that on the 23rd day of January, 1897, final decree was entered in said court foreclosing said trust deeds or mortgages, and a decree was entered for the sale of all the property hereinbefore described and covered by said trust deeds or mortgages, which included the strip of ground designated as "depot grounds," depot buildings and side tracks situated thereon; that on the 10th day of March 1897, the special master appointed by the court to make the sale under said decree of foreclosure sold all of said described property, and reported said sale to the court on said date, and which by order of said court was duly confirmed; that on the 31st day of March, 1897, the plaintiff herein, The Chicago, Indianapolis & Louisville Railway Company was incorporated under Indiana law, and duly acquired the title and possession of all of said railroad, railroad property and franchises, including the strip of ground hereinbefore described and designated as "depot grounds" under a deed of conveyance from the purchasers of the said property at said foreclosure sale; and have since owned and occupied all of
19 railroad property and its real estate of every kind and description, including the land described as "depot grounds;" that the lien created by said trust deeds or mortgages hereinbefore referred to covered the said depot grounds and constituted an absolute lien thereon, together with the other property therein described, and became a lien thereon long prior to the lien asserted by the defendant herein, and that the claim of the defendant is against the property of the Louisville, New Albany & Chicago Railway Company, and is not a claim of any kind or nature against the property of the plaintiff, and that defendant's claim originated as follows, to wit: Said defendant McGuire in September, 1896, recovered a judgment in the circuit court of White county, Indiana, against the Louisville, New Albany & Chicago Railway Company for twenty-four hundred dollars ($2400.00); and in January, 1897, said McGuire caused a

transcript to be filed in the clerk's office of the circuit court of Pulaski county, and an execution was issued to the sheriff of said county; that said sheriff levied said execution upon a part of the said strip of land marked "depot grounds" and advertised same for sale at the court house in Winamac, Pulaski county, Indiana, for November 13, 1897; that prior to the said date of sale the plaintiff herein brought its suit in the Pulaski circuit court and caused summons to be issued therein to the defendants, McGuire, and Dellinger, sheriff, and also caused a *lis pendens* notice to be duly filed and recorded in the clerk's office of said county, prior to said date of sale; that on said 13″ day of November, 1897, the sheriff of said county, defendant herein, offered the property so levied on for sale at the court house door, and the same was bid in by the defendant M. M. Hathaway, who was one of plaintiffs attorneys of record in the suit above referred to, and the sheriff of said
20 county executed to the said defendant Hathaway a certificate of purchase; that levying said execution on plaintiff's property, and the selling of same by the sheriff, constitutes a cloud upon the title of the plaintiff to the herein described real estate.

Wherefore, plaintiff prays that its easement in and to the said real estate described be quieted and set at rest in the plaintiff, and that the defendants, and each of them, and all persons claiming by, through or under them, or either of them, be permanently, enjoined from setting up any claim, title or interest under said execution and sale to said described real estate, or any part thereof, and that the sale thereof be set aside, and the certificate issued by the defendant sheriff to said defendant Hathaway be cancelled, and the plaintiff be awarded all other proper relief, including its judgment for costs in this behalf expended.

E. C. FIELD,
W. S. KINNAN, &
JOHN NYE,
Attorneys for Plaintiff.

("Exhibit A," next attached.)

21 EXHIBIT "A."

(Here follows plat marked page 21*a*.)

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

22 And thereupon the defendants separately and severally refile a motion to make the amended 2nd paragraph of complaint more specific, which motion is in thses words·

STATE OF INDIANA, } ss:
Pulaski County, }

In Pulaski Circuit Court, Jan. Term, 1898.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY CO.
vs.
PATRICK MCGUIRE, M. M. HATHAWAY, & PHILLIP DELLINGER, Sheriff.

Come now the defendants and jointly and severally move the court to require the plaintiff to make the second paragraph of the amended complaint more specific in this, to wit: That the plaintiff allege the interest & title that M. H. Allison had in and to the lands described in the second paragraph of the amended complaint at the time the said Allison platted or pretended to plat the land therein described.

M. WINFIELD,
SPENCER & STEIS & HATHAWAY,
Att'ys for Def.

And thereupon the court sustains said motion, to which ruling of the court the plaintiff excepts and says that it will not amend said 2nd paragraph by making the same more specific as ordered, but will abide its exceptions to the ruling of the court, and asks and obtains leave to file its special bill of exceptions No. 1, within ten (10) days from the date hereof.

Thereupon, this cause being at issue, is submitted to the court for trial, and the court appoints Miss Sarah Decker, stenographer, to report the said cause, and she is thereupon duly sworn to discharge the duties of said reporter and thereupon the plaintiff moves
23 the court for a finding of the facts specially and court's conclusions of law thereon which motion is granted and the court having heard a part of the evidence, adjourns court until tomorrow morning at 9 o'clock a. m.

And afterwards, towit:—on the 27th day of January, the same being the 4th judicial day of the January term 1898, of the Pulaski circuit court, when the following proceedings were had and entered of record in Order Book No. 23 page No. 121 and is in the words and figures following, towit:—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, PHILLIP DELLINGER, Sheriff Pulaski County, Indiana, and M. M. Hathaway.

Come again the parties in person and by counsel, and now again comes the plaintiff and files its bill of exceptions No. 1, which is signed by the court, and reads as follows, towit:—

STATE OF INDIANA,
County of Pulaski, } ss:

In Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, Sheriff of Pulaski County.

Be it remembered, that on this the 26th day of January, 1898, the same being the 3rd judicial day of the January term of said court the following proceedings were had, towit: namely:—

24 The defendants filed their joint and several motion to require the plaintiff to make the second paragraph of the amended complaint more specific in this, towit:—

"That the plaintiff allege the interest and title that M. H. Allison had in and to the lands described in the second paragraph of the amended complaint at the time the said Allison platted or pretended to plat the lands therein described," which motion is in these words and figures following:—

"STATE OF INDIANA,
Pulaski County, } ss:

"In Pulaski Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, and PHILLIP DELLINGER, Sheriff.

"Come now the defendants and jointly and severally move the court to require the plaintiff to make the second paragraph of the amended complaint more specific in this towit: That the plaintiff allege the interest and title that M. H. Allison had in and to the lands described in the second paragraph of the amended complaint at the

time the said Allison platted or pretended to plat the lands therein described.

M. WINFIELD,
SPENCER & STEIS & HATHAWAY,
Att'ys for Def.

And thereupon the court sustained said motion to make said amended second paragraph of complaint more specific.

To which ruling of the court the plaintiff at the time excepted and the plaintiff thereupon refused to amend said second paragraph of the amended complaint, by making the same more specific as so ordered, and said that it would abide its exception to the ruling of the court and ten days' time are given in which to file its bill of exceptions No. 1.

And the plaintiff now presents this its special bill of exceptions No. 1 to the court and prays that the same may be signed and approved, which is done this 27th day of January, 1898.

JOHN E. CASS,
Special Judge."

And this cause is taken under advisement by the court.

And afterwards, towit:—on the 17th day of September, the same being the 12th judicial day of the September term, 1898, of the Pulaski circuit court, when the following proceedings were had and entered of record in Order Book No. 23 at pages Nos. 383 and 395, and is in the following words and figures, towit:—

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

Come the parties in person and by counsel, and the court being fully advised, finds the facts specially and its conclusions of law thereon, which finding of facts and conclusions of law are in the words and figures following, towit:

STATE OF INDIANA,
County of Pulaski, } *ss:*

In the Pulaski Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE, M. M. HATHAWAY, & PHILLIP DELLINGER, Sheriff of Pulaski County.

Finding of Facts and Conclusions of Law.

The court having been duly required to find the facts specially in said cause, and state its conclusions of law thereon finds the facts as follows, namely:—

1. That the plaintiff, The Chicago, Indianapolis & Louisville Railway Company, is a railway corporation duly incorporated under the laws of the State of Indiana.

2. That the plaintiff and the defendants derain their respective claims and title through the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the State of Indiana.

Plaintiff's Title.

3. That one Allison made a plat, which was duly acknowledged by him and recorded in the recorder's office of Pulaski county, April 8″, 1862, of which a copy is attached hereto and made a part hereof, marked Exhibit A, which indicates the land in controversy in this suit; that said piece or parcel of ground was designated on said plat "depot grounds." That said Allison recited therein that the depot building was then built thereon, and in signing said plat describes himself as the "proprietor of unsold lots." That at said time the Louisville, New Albany & Chicago Railroad Company had its railroad track constructed through the piece or parcel of ground marked "depot grounds;" that no other railroad was then constructed into or through said town of Francesville, or near
27 the same, and has been constructed into or through said town since said time.

4. That at the November term 1872, of the circuit court of the United States for the district of Indiana, and on the 20″ day of November, 1872, in the suit of Chas. E. Bill against The Louisville, New Albany & Chicago Railroad Company, *et al.* said court decreed that the railroad company, defendant in said suit, was indebted under a certain trust deed of date November 14th, 1852, to the holders of the bonds issued and secured by said trust deed in the sum of four million, nine hundred and thirty-two thousand and three hundred dollars, and that the same was due and unpaid from the said railroad company, and accordingly said court entered a decree foreclosing all and singular the line of railroad running from New Albany in the county of Floyd, Indiana, to Michigan City, Indiana, through Pulaski county, and through counties therein mentioned, including the right of way, land, superstruction, and tracks, and all other real and personal property appurtenant to the said line of railroad as an entirety, and by said decree said court appointed one John D. Howland,.special master and empowered him to execute said decree by a sale and conveyance of all of said property; that accordingly of date December 27th, 1872, said Howland conveyed in accordance with the terms of said decree to the purchasers at said sale the entire line of railroad of the said Louisville, New Albany & Chicago Railroad Company "running from New Albany, in the county of Floyd, through the county of Pulaski, Indiana, and other counties in the State to Michigan City, Indiana, including the right of way and land occupied thereby, and superstructure and tracks

thereon, depot grounds and buildings thereon, and all other real and personal property appurtenant to said line of road, together with the franchises to maintain and operate the same; to have and to hold the same in fee simple unto the parties of the second part
28 and their heirs and assigns forever.

5. That December 31, 1872, the Louisville, New Albany & Chicago Railway Company was created a railway corporation, acquiring thereunder the franchises and all rights and title purchased at the sale by said Howland under the decree of foreclosure in said United States court for the district of Indiana, and said articles of association of said Louisville, New Albany & Chicago Railway Company were duly filed in the office of the secretary of state, January 7th, 1873.

6. That on May 5th, 1881, articles of consolidation were duly made and entered into between the said Louisville, New Albany & Chicago Railway Company and the Chicago & Indianapolis Air Line Railway Company, consolidating the said line of railroad extending from New Albany, Indiana, to Michigan City, Indiana, with the line of railroad owned by the Chicago & Indianapolis Air Line Railway Company, extending from the city of Indianapolis, Indiana, to the Indiana State line between Indiana and Illinois, at or near the city of Chicago, Illinois, and under said consolidation said consolidated company took the name of the Louisville, New Albany & Chicago Railway Company.

7. That on the first day of January, 1886, the said Louisville, New Albany & Chicago Railway Company executed its trust deed to the Farmers Trust & Loan Company, a corporation created and existing under the laws of the State of New York, and John H. Barker, of Michigan City, trustees, to secure bonds issued thereunder, and for said purposes conveyed to said trustees its line of railroad extending from New Albany to Michigan City, in the State of Indiana, running through the county of Pulaski, among other counties mentioned therein; also all estate, right, title and interest of said railway company in and to any and all real estate belonging
29 to said railway company; it being the true intent and meaning of these presents that the said railway company shall and doth convey to the said trustees all and all manner of franchises of every kind and description, and however derived and wherever situate; all and all manner of real estate and interest therein wherever such real estate may be situate, for the purposes connected with or appertaining to said railroads or railways; that said mortgage or deed of trust was duly recorded in the county of Pulaski, on the 15" day of January, 1886, in Book "P" of Mortgages, on page 191.

8. That on May 1st, 1890, said Louisville, New Albany & Chicago Railway Company executed an additional mortgage or trust deed to the Central Trust Company of New York, and John H. Stotsenburg, trustees, to secure bonds issued thereunder, conveying "all the present line of railway extending from New Albany to Michigan City,

Indiana, running through the county of Pulaski, among other counties in said State, including and conveying by these presents all the property of every sort and nature, real, personal and mixed, now owned by said railway company, for the purposes of and connected with or appertaining to the railway above mentioned; also all the estate, right, title and interest of said railway company in and to any and all real estate belonging to said railway company;" that said mortgage or deed of trust was duly recorded in the recorder's office of Pulaski county, and within the time required by law, the record of which is in Mortgage Record Book "U" page No. 41.

9. That on the 1st day of September, 1894, said Louisville, New Albany & Chicago Railway Company executed a further mortgage or deed of trust to the Central Trust Company of New York and James Murdock, trustees, to secure bonds issued thereunder conveying to said trustees, "all the railway system extending from
30 New Albany to Michigan City, Indiana, and through Pulaski county, Indiana, among other counties described therein, and property of the said railway company of every kind and nature however owned, held, leased or enjoyed; including and conveying by these presents all the property of every sort and nature, real, personal and mixed, now owned by said railway company, for the purposes of and connected with or appertaining to the railway, and all estate, right title and interest of the party of the first part in and to any and all real estate belonging to the said party of the first part, and all and all manner of real estate and interest therein, wherever such real estate may be situate, at the date of these presents owned or possessed by the said railway company; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property which the said railway company now owns, as fully and to the same extent as if all such property were specifically described herein and conveyed hereby."

10. That in each of the three foregoing mortgages or trust deeds there was an express provision covering after acquired property, which provision in each of said mortgages was substantially as follows:

"Also all other railroads, extensions and branch lines which the railway company may at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, including and conveying by these presents all the property of every sort and nature, real, personal and mixed, now owned by said railway company, and all that it may in the future add, construct or acquire for the purposes of and connected with or appertaining to the said railroad mentioned and described, whether now owned or hereafter to be acquired; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and
31 bind all railroads real and personal property, which the said railway company now owns or at any time may own, as fully and to the same extent as if all said property were now in existence

and owned by the said railway company and was specifically described herein and conveyed hereby."

11. That in 1896, The Farmers Loan & Trust Company and The Central Trust Company, both of New York, John H. Barker and John H. Stotsenburg, trustees in the foregoing named mortgages, brought suit in the United States circuit court for the district of Indiana, to foreclose said mortgages against said railway company, and issue being joined, a decree of foreclosure was made and entered by said court adjudging default in the payment of the interest due and payable on each of said named mortgages, and adjudging that in consequence of such default in the payment of interest that by the terms and conditions of said mortgages the principal sum also became due — payable, and adjudging that said railway properties were covered by said respective mortgages, and that the same should be sold as one railroad system, and the same could not be sold in separate parcels without injury to the rights of creditors and the parties in interest; and the decree of said court was accordingly made and entered on the 23rd day of January, 1897, directing the sale by one William A. Van Buren, special master appointed in said decree for the purpose of making said sale, of "all and all manner of real estate or interest therein, wherever such real estate may be situate, and all franchises and property of every description and kind real, personal or mixed." And it is also decreed that the purchaser or purchasers of the property should be vested with, "and shall hold possession, and enjoy the said mortgaged premises and property, and all the rights, privileges and franchises appertaining thereto
32 as fully and severally as the said Louisville, New Albany & Chicago Railway Company now holds and enjoys or has heretofore held and enjoyed the same.

12. That on the 10th day of March, 1897, said William A. Van Buren, special master appointed in said foreclosure suit made his written report to the court showing that he had given the notice as required by the order of the court, and done and performed all other things by said decree required, and showing that the highest and best bid for said property was made by Frederick P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of the bondholders of the Louisville, New Albany & Chicago Railway Company; and that the same was sold to such persons at and for the sum of three million, one thousand dollars, ($3,001,000.00); and that on said date said court ordered, adjudged and decreed that the said report of sale of the said master "be and the same is hereby confirmed;" and that the said sale "be and the same is hereby ratified, approved, confirmed and made absolute" and decreeing that such special master execute and deliver to said purchasers, or their assigns, a deed of conveyance of said property.

13. That on the 9th day of March 1897, William A. Van Buren, special master, made a deed to Frederick P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of the bondholders of the Louisville, New Albany & Chicago Railway Company, conveying to them

"all of the railway system and property of every kind and nature formerly of the Louisville, New Albany & Chicago Railway Company, including and conveying by these presents all of the property of every sort and nature, real, personal and mixed, heretofore owned by said several and respective railroad or railway companies, for the purpose of and connected with or appertaining to the railroads or railways above mentioned, together with all the lines of said railroad or railway companies, and each of them, and all estate,
33 right, title and interest of said railroad or railway companies, and each of them, in and to any and all real estate which at the time of the entry of the decree aforesaid was owned and possessed by said railway or railroad companies and each of them.

14. That on the 31st day of March, 1897, said Frederick P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of the bondholders of the Louisville, New Albany & Chicago Railway Company made a deed of conveyance to the plaintiff herein conveying, among other things, "all estate, right, title and interest of said railroad or railway companies, and each of them, in and to any and all real estate, and all and all manner of real estate or interest in real estate, wherever such real estate may be situated;" the same conveying all right, title and interest acquired by said purchasing committee under said decree of foreclosure and sale by said William A. Van Buren, to the said purchasing committee.

15. That in April, 1862, the Louisville, New Albany & Chicago Railroad Company actually occupied said described ground with railroad and side tracks running lengthwise through the same, and had a depot building constructed thereon, and there was not then and never has been any other depot building constructed by any other person or railroad company thereon; and said railroad company continued in actual occupancy from said date of such portions thereof as were covered by said tracks, depot building and stock pens; and from April, 1862, continued in actual and uninterrupted possession thereof until the year 1873, when the Louisville, New Albany & Chicago Railway Company by deed of conveyance by said Howland, special master under said foreclosure proceedings, of said property to the Louisville, New Albany & Chicago Railway Company; that said last named company then and there took actual possession of all said parts of said described land as were covered
34 by said railroad and side tracks, depot buildings and stock pens, and continued in the peaceable and uninterrupted possession of the same until 1881, when said railway company consolidated with the Chicago & Indianapolis Air Line Railway Company, and thereupon said consolidated company by the same name continued in the peaceable, uninterrupted and actual possession of the same property theretofore held by said railway company until 1896, when the plaintiff, The Chicago, Indianapolis & Louisville & Railway Company took actual possession thereof under its deed made by said special master in the foreclosure suit aforesaid, and continued from said time to the present in the actual, continued, peaceable and uninter-

rupted possession thereof until the claim and title was asserted by defendants as hereinafter shown; that each of said above named companies under said deeds of conveyance and said act of consolidation *were* in the constructive possession of the balance of said described land designated on said plat as depot grounds, except a strip sixty feet in width on the east side of said platted depot grounds and over the length thereof which was used and occupied by a public street; and except also a like strip on the west side thereof over the length of said piece of land designated depot grounds, which was used and occupied as a public street; and except also two strips of land crossing the same east and west, being extensions of two streets marked on said plat, which have also been used and occupied as public streets.

16. That on the east side of the land marked "depot grounds" there is about a dozen buildings, some brick and some frame, built in line on designated lots facing the depot ground some of which have been built for twenty-five years; and on the west side of what *is* designated "depot grounds" there are some twelve or fifteen buildings built in line on designated lots, and facing said depot grounds, the oldest of which have been built for thirty years.

17. That in 1896, by authority of the town of Francesville the street on the east side of the depot grounds and next to the line of buildings referred to in the preceding finding, a street sixty feet in width, was improved and graveled under authority of law, and by direction of the proper officers of the town of Francesville; and one-half of the cost and expense thereof was assessed to the Louisville, New Albany & Chicago Railway Company, and the same was made a lien upon said land of said company west thereof and adjacent thereto, designated on the plat as "depot grounds;" and said railway company, and this plaintiff, has paid the full assessments for said street improvement, with the interest accumulating thereon.

18. That in 1896, by like authority of law, and under the direction of the proper officers of said town of Francesville the street running east and west across said depot grounds, being an extension of Montgomery street, as designated on said plat, was also ordered improved and graveled by said authorities of said town, and the entire cost thereof was assessed against the lands on either side thereof, marked "depot grounds," to the Louisville, New Albany & Chicago Railway Company, and the said assessment was made a lien upon said real estate for the payment of said improvement; and that said railway company, and this plaintiff, has paid the annual assessment for this improvement, together with the interest accumulating thereon.

19. That a piece or parcel of ground across the lands marked "depot grounds," being the extension of one of the streets designated on said plat as running east and west, has been used as a public street for more than twenty years.

20. That on the west side of said land marked "depot grounds"

a north and south street has been used and occupied by the public for more than twenty years as a public street.

36 21. That on said land designated "depot grounds" on the plat and on the east side of the railroad track, there *has* been constructed elevators, a hay barn, a corn crib, a warehouse, a coal house and grain offices, and a lumber shed with a lumber yard attached thereto, the first of which was constructed thereon about four years ago, and the last of which was constructed thereon one year ago; that the above named elevators, hay barn, etc., were used by private individuals to facilitate their business in connection with the receipt of lumber, the shipment of hay, grain, and coal, and possession was held by each of them under a lease from the said railway company, and under no other claim of right. There *was* also two small buildings, one used as a restaurant and the other as a grocery store, and the parties occupying the same held by a lease from said railway company, and under no other claim of right. There was also on said ground a small blacksmith shop which was constructed without authority from said railway company and without any claim of right to do so, the owner thereof having notified said railway company that he would remove the said blacksmith shop whenever said company required him to do so; that said leases by said railway company to said individuals were at nominal rentals, and for the purpose of facilitating and adding to the business of said railway company, and for the accommodation of the town of Francesville and the public.

22. That the Louisville, New Albany & Chicago Railway Company reported annually to the auditor of Pulaski county said lands designated "depot grounds" on said plat for taxation, designating the same as three lots in said returns; and that said returns for taxation were made annually from 1862 to the present time as provided by law.

23. The defendant introduced in evidence a quit claim deed from one Brooks executed in February, 1896, conveying in con-

37 sideration of one dollar the said lands designated on the plat as "depot grounds," and therein referring to the plat of said Allison and the record thereof as being the same land intended to be conveyed by said quit claim deed; that in 1862 when said Allison made and recorded said plat, the father of said Brooks, the grantor in said quit claim, held the title to said land marked on said plat as depot grounds, and in 1896 the grantor in said deed as the only surviving heir of said Brooks, deceased, conveyed whatever title he had to the Louisville, New Albany & Chicago Railway Company.

Defendant's Title.

24. That the defendant McGuire brought a suit in the White circuit court against the Louisville, New Albany & Chicago Railway Company, and in September, 1896, obtained a judgement for about

twenty-four hundred dollars; that on January, 1897, he caused a transcript of said proceedings and judgement to be filed in the clerk's office of the Pulaski circuit court, Indiana, and caused an execution to issue from said office to the sheriff of said county on said transcript of judgment, and the defendant Dellinger, sheriff of Pulaski county, levied said execution upon a part of said land designated as "depot grounds" on the plat and particularly described in his return to said execution; that said sheriff caused the same to be duly advertised, and on the day fixed for the sale thereof at the court house door sold the same to the defendant Hathaway, who at the time of his purchase was an attorney of record in said cause, and had actual notice of the issues made by the plaintiff herein, and had constructive notice thereof by a *lis pendens* notice duly filed and recorded in the clerk's office of said county prior to the date of said sale.

Conclusion of Law.

On the foregoing facts I conclude as a matter of law that
38 the plaintiff is entitled to recover and have its title quieted to the lands in question as against the defendants and all persons claiming title through them, or either of them, under the judgment, execution and sale herein.

JOHN E. CASS,
Special Judge.

(Exhibit accompanying above finding of facts and conclusion of law, is next attached.—CLERK.)

38*a* EXHIBIT.

(Here follows diagram marked page 38*b*.)

39 And the court now enters judgment upon the findings, adjudges and decrees, that the title to the -and in controversy to wit: a piece or tract of -and beginning at the south west corner of Yellow and Bill streets in the town or village of Francesville, Pulaski county, Indiana, thence south along the west line of said Bill street to the north line of Sherman avenue, thence west with said north line of Sherman avenue a distance of one hundred and fifty feet (150 ft.), thence north parallel with said west line of Bill street to the south line of Yellow street, thence east with the south line of Yellow street a distance of one hundred and fifty feet (150 ft.) to the place of beginning.

Said piece or parcel of land being the same described in a certain plat dedicated by one Allison in March, 1862, and acknowledged and recorded in the office of the recorder of Pulaski county, Indiana, April 8th, 1862, be quieted and forever put at rest as against any claim of title, right or interest in said defendants or either of them, and said defendants are each and all of them enjoined from setting up or asserting any right, title or interest in said described lands, against the title herein adjudged and decreed to said plaintiff, and it is further adjudged that the plaintiff recover of and from the defendants all its costs in this behalf expended.

And thereupon the defendants ask leave to file their joint and several motion for a new trial as of right under the statute, to which the plaintiff objects, which objection the court over-rules and the plaintiff excepts.

And thereupon the defendants file their motion for a new trial and tender their bond which is in these words, towit:

Defendant's Motion for a New Trial as of Rights.

STATE OF INDIANA, } ss:
Pulaski County, }

In Pulaski Circuit Court, September Term, 1898.

40 CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE ET AL.

Come now the defendants and jointly and severally move the court to vacate the judgment entered in the above entitled cause and ask for a new trial as of right under section 1076 Revised Statutes of 1898, Burns' addition, and tender now for the approval of the court, a bond for the payment of all costs and damages that may be recovered against them in this action.

STEIS & HATHAWAY,
J. M. WINFIELD,
Attorneys for Def'ts.

Granted Objection & Ex.

To the filing of which motion the plaintiff objects and excepts, and the defendants thereupon file their bond with W. S. Huddleston as surety in the words following, towit:—

STATE OF INDIANA, }
Pulaski County, } *ss:*

In Pulaski Circuit Court, September Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs. }
PATRICK MCGUIRE, M. N. HATHAWAY, and PHILLIP DELLINGER, Sheriff Pulaski County. }

We undertake that the defendants in the above entitled cause shall pay all costs and damages which shall be recovered against them therein.

M. M. HATHAWAY ET AL.
W. S. HUDDLESTON.

41 Approved by me this 17th day of September 1898.

JOHN E. CASS,
Special Judge.

which bond and surety is approved, and thereupon the court sustains the defendants' motion for a new trial, as matter of right, and vacates the judgment herein rendered, to which ruling the plaintiff objects and excepts, and it is therefore ordered that the defendants have a new trial, as of right, and that the judgment be vacated, and the special judge John E. Cass declines to further sit or try said cause.

JOHN E. CASS,
Special Judge.

And afterwards, to-wit: on the 15th day of November, the same being the 2nd judicial day of the November term 1898. of the Pulaski circuit court, *when* the following proceedings were had and entered of record in Order Book # 24 at page # 9, and is in the following words and figures, to-wit:

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs. }
PATRICK MCGUIRE ET AL. }

Come the parties, and the regular judge having heard motion for a temporary restraining order, and being disqualified, the Honorable

Moses B. Lairy is hereby appointed special judge to try and determine the cause, and said cause is set for hearing on the 2nd Tuesday of the present term of this court, being the 22nd day of November, 1898.

And afterwards, to-wit: on the 22nd day of November, the same being the 8th judicial day of the November term 1898 of the Pulaski circuit court, *when* the following proceedings were had and entered of record in Order Book # 24, page # 27, and is in the following words and figures, to-wit:

42 CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, PHILLIP DELLINGER, Sheriff of Pulaski County, and M. M. Hathaway.

Come the parties by their counsel, and plaintiff files affidavit for a change of venue from the county, said affidavit being in the words and figures following, to-wit:

STATE OF INDIANA, *County of Pulaski,* } ss:

In the Pulaski Circuit Court.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE ET AL.

Elisha C. Field, being first duly sworn on oath says that he is the general solicitor of the plaintiff in the above entitled cause, and that by its authority and under its direction — makes this affidavit in its behalf.

Affiant says that the plaintiff cannot have a fair and impartial trial in said cause in said county of Pulaski for the reason that an odium attaches to its cause of action on account of local prejudice in said county; that said facts are true as affiant is informed and verily believes.

Wherefore, a change of venue is prayed from said county.

ELISHA C. FIELD.

STATE OF ILLINOIS, *Cook County,* } ss:

Subscribed and sworn to before me this 17th" day of November A. D. 1898.

43 [L. S.]

W. S. KINNAN,
Notary Public.

Answers Withdrawn ; Def't Hathaway Files Separate Demurrer to 2nd Part of Compl.

And the defendants ask and are granted leave to withdraw their answer herein, which answer is now withdrawn by the defendants, and the court orders that the defendants leave the answer or a copy thereof on file in this cause, and the defendant M. M. Hathaway now files separate demurrer to the second paragraph of the amended complaint, said demurrer being in these words, towit:

STATE OF INDIANA, } ss:
Pulaski County, }

In Pulaski Circuit Court, November Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs.
PATRICK MCGUIRE, MEDARY M. HATHAWAY, ET AL. }

The defendant Medary M. Hathaway, separately for himself hereby demurs to the second paragraph of the amended complaint and for cause of demurrer, says,

First. That said second paragraph of complaint does not state facts sufficient to constitute a cause of action.

WINFIELD, SPENCER, & STIES & H., *Att'ys.*

And the defendant M. M. Hathaway now files affidavit directed to the discretion of the court in determining the county to which venue of this cause shall be changed, said affidavit being in the words and figures following, towit:—

STATE OF INDIANA, } ss:
Pulaski County, }

Pulaski Circuit Court, November Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
44 *vs.*
MEDARY M. HATHAWAY ET AL. }

Medary M. Hathaway defendant in the above entitled cause being duly sworn upon oath says: That White county adjoins Pulaski county on the south. That Monticello the county seat of White Co. is about 20 miles from Francesville, Pulaski county, Indiana. That the plaintiff's road passes through from Francesville, south to

the town of Monticello and Monticello can thus be reached by direct railroad connection. That there is no other county seat of any county adjoining Pulaski Co. that has direct rail road connection from Francesville. That all the controversy in this cause arises out of claims to real estate situate in the town of Francesville. That much of the testimony will be parol testimony. That all of the witnesses summoned in said cause reside in the town of Francesville. That there will be probably 20 witnesses subpœn-ed to testify. That said witnesses can attend at Monticello easily by the aforesaid rail road connection. That it will be a great convenience to said witnesses if the cause is sent to White county and save them a great deal of expense and time as they can reach Monticello in less than an hour. While if sent to any other adjoining county it will take about a day to reach court and will cost them a great deal more.

This affiant further makes oath, that the court in White county meets Monday Nov. 28" and a trial can be had at the said term, while if sent to any other county it will be 2 or 3 months before a trail can be had. That the clerk can make a transcript within four hours and the change can be perfected within 3 or 4 days so that the cause will come up for trial at the term commencing Nov. 28", and further affiant deposes not.

MEDARY M. HATHAWAY.

Subscribed and sworn to before me this 21st day of Nov. 1898.

45 [L. S.] VES. Q. HATHAWAY, *N. P.*

Change of Venue to White County.

And the court being advised, now sustains the motion for a change of venue of this cause.

Wherefore it is ordered that the venue of this cause be changed to the White circuit court of White county, Indiana, and four days are given in which to perfect said change.

MOSES B. LAIRY,
Special Judge.

STATE OF INDIANA, } ss:
Pulaski County, }

I, Elmer W. Smith, clerk of the Pulaski circuit court, hereby certify that the foregoing pages contain a full, true and complete transcript of the entries made in the case of Chicago, Indianapolis and Louisville Railway Company *vs.* Partick McGuire, *et al.* and that the papers forwarded therewith are all of the papers on file therein in my office.

Witness my hand and seal of the Pulaski circuit court, this 23rd day of November, 1898.

[L. S.] ELMER W. SMITH,
Clerk of the Pulaski Circuit Court.

46 And afterwards, towit:—at a term of the White circuit court of Indiana, begun and held in the court house in the town of Monticello, in said county and State, commencing on the 4th Monday being the 24th day of April, 1899, said term being held in pursuance of law, present the Honorable Truman F. Palmer, sole judge of said court, F. B. Humston, clerk thereof and John W. Warner, sheriff of said county, and on the 22nd judicial day of said term, being the 18th day of May 1899, the following proceedings were had in the said court, towit:—

Comes now the Honorable James V. Kent, and presents his appointment as special judge of this court reading as follows:

James V. Kent Appointed Special Judge.

STATE OF INDIANA, }
County of White. }

White Circuit Court, April Term, 1899.

Truman F. Palmer, judge of the White circuit court of Indiana, being disqualified to preside at the trial of certain causes pending therein: towit:—Chicago, Indianapolis and Louisville Railway Company, against Patrick McGuire; M. M. Hathaway; and Phillip Dellinger, sheriff &c. &c. by reason of the fact that the undersigned has been interested as counsel in matters out of which the said action grew.

The Honorable James V. Kent now judge of the 45th judicial circuit of the State of Indiana, is appointed to preside in said White circuit court and to act as special judge in the trial of said cause, and also to take full charge of the docket of said White circuit court while he shall be present on account of said cause so set down specially before him, with as full power and authority to try and determine all causes now pending or to be commenced in said court while he is so present, as the undersigned might have if personally present and presiding.

Witness my hand this 16th day of May 1899.

TRUMAN F. PALMER,
47 *Judge White Circuit Court.*

He now takes his seat upon the bench hereof, present the other officers as heretofore, and the following proceedings are had in the case of

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs.
PATRICK MCGUIRE ET AL. }

Demurrer to Complaint Withdrawn.

Come now the parties, the plaintiff by Sellers & Uhl, and E. C. Field and George W. Kretzinger, its attorneys; and the defendants

by C. C. Spencer; M. Winfield and Steirs & Hathaway, their attorneys, and the defendants now withdraw their demurrer to the plaintiff's complaint, and they now refile their answer to complaint reading as follows, towit:—

Answer to 1st Par. of Amended Compl.

STATE OF INDIANA, }
County of Pulaski, } ss:

In the Pulaski Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs.
PATRICK MCGUIRK and M. M. HATHAWAY. }

Defendants *and* for answer to the 1st paragraph of plaintiff's amended complaint say, that they deny that the plaintiff is the owner and denies that it has any interest whatever in the following described parts and portions of the lands described in the plaintiff's complaint, towit:—Commencing at the north west corner of lot No. twelve (12) in block No. nine (9) in the town of Francesville, in Pulaski county, Indiana, thence west parallel with Yellow street in said town, 50 feet to a post on the west line of Bill street at the place of beginning thence west parallel with the south line
48 of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way 190 feet to a post, thence east parallel with the south line of Yellow street 150 feet to the west line of Bill street thence north with the west line of Bill street 190 feet to the place of beginning.

Also commencing with the south west corner of lot No. seven (7) in block No. nine (9) in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of beginning, thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six (66) feet to a post, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with sixty-six (66) feet to the place of beginning.

Commencing at the north-west corner of lot No. twelve (12) in block No. fourteen (14) in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of right of

way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way three hundred and sixty (360) feet to the north line of James street to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of Montgomery street to the place of beginning.

Also: Commencing at the north west corner of lot No. twelve (12) in block No. twenty-two (22) in said town, thence west
49 with the south line of James street to the west line of Bill street to a post at the place of beginning; thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of the said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street three hundred and sixty (360) feet to the south line of James street to the place of beginning.

All of the above described lands being in the town of Francesville in Pulaski county, in the State of Indiana.

And as to such and above described the defendants deny each and every allegation contained in the plaintiff's amended complaint. And as to the remaining portions of said lands described in the plaintiff's amended complaint, these defendants admit that the plaintiffs is the owners thereof and these defendants hereby expressly disclaim all interests therein or any claims thereto whatever.

M. WINFIELD AND
STEIS & HATHAWAY AND
CHAS. C. SPENCER,
Att'ys for Def'ts.

2nd Trial.

Upon plaintiff's motion the depositions on file herein are now ordered published in open court.

The issues being joined between the parties, the defendants now move the court that this cause be tried by a jury, which motion is sustained by the court, to which ruling of the court the plaintiff excepts and is given ten days in which to file its bill of exceptions.

Comes now a jury, towit: Jacob W. Daugherty; William H. Hutton; William H. Downey; Robert D. Roberts; James P. Foltz; John N. Wilson; Alfred Mathews; John P. Brown; Isaac Amick;
50 William Cowger; Joseph Mowerer and Albert Hibner, twelve good and lawful men, householders and free holders and qualified voters of this county, duly elected, tried and sworn to well and truly try the issues joined between the parties and a true verdict render according to the law and the evidence.

Comes also Lucy S. Taylor, the official reporter hereof, heretofore appointed and qualified as such; and the jury having heard a part

of the evidence, is now allowed to separate under the instructions of the court until 9 o'clock tomorrow morning, until which time the further hearing of this cause is continued.

And afterwards, towit, on the 19th day of May 1899, being the 23rd judicial day of the said April term 1899, of said White circuit court, present the said Special Judge James V. Kent, and the other officers as heretofore, the following further proceedings were had in the case of,

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

Court Directs Jury to Return a Verdict for Defendant-.

Come again the parties, in person and by their attorneys, and comes also the jury; and the testimony being closed, the court now directs the jury to return a verdict for the defendants herein, and accordingly the jury now returns their verdict as follows,

51 "STATE OF INDIANA, *White County,* } *ss:*

In the White Circuit Court, April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana.

We the jury find for the defendants.

JAMES P. FOLTZ, *Foreman.*"

And thereupon the plaintiff files its motion for a new trial which motion is in these words,

Plaintiff's Motion for a New Trial.

STATE OF INDIANA, } ss:
White County, }

In the White Circuit Court, April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY }
vs. }
PATRICK MCGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, } Sheriff Pulaski County. }

The plaintiff herein moves the court for a new trial in said cause upon the following grounds, towit:—

1st. Because the court erred in directing the jury to return a verdict for the defendants.

2nd. Because the court erred in striking out the 2nd paragraph of plaintiff's amended complaint.

3rd. Because the court erred in ordering the plaintiff to make its 2nd paragraph of amended complaint more specific.

52 4th. Because the verdict of the jury is contrary to the evidence.

5th. Because the verdict of the jury is contrary to law.

6th. Because the verdict of the jury is not supported by sufficient evidence.

7th. Because the court erred in refusing to permit the plaintiff to introduce and read in evidence the town plat of the town of Francesville, made and executed by one Allison in 1862, recorded in the recorder's office of Pulaski county.

8th. Because the court erred in permitting the defendants over the objection and exception of the plaintiff, to read in evidence the return of the sheriff on the execution issued upon the judgment of the defendant McGuire against the Louisville, New Albany and Chicago Railway Company.

9th. Because the court erred in permitting the defendants to read in evidence, over plaintiff's objection and exception the deed by the Sheriff Dellinger, to the defendant Hathaway on the execution issued upon the judgment of the defendant McGuire against the Louisville, New Albany and Chicago Railway Company.

10th. Because the court erred in refusing to strike out said sheriff's deed from the evidence in said cause on plaintiff's motion.

11th. Because the court erred in permitting the witness Hathaway to testify, over the objection and exception of the plaintiff to the occupancy and use of the grounds in controversy by various persons prior to February 20th 1896.

12th. Because the court erred in permitting the witness Hathaway to testify over the objections and exceptions of the plaintiff, to

the use and occupancy of the land in controversy after February 20th 1896.

53 13th. Because the court erred in refusing the offered testimony of the witness Petre as to the amount and payment of taxes to the town of Francesville on the land in controversy for town purposes and for street improvements for the years 1891 to 1898 inclusive as the same appeared on the tax duplicate of said town of Francesville.

Whereupon the plaintiff prays a new trial.

GEO. W. KRETZINGER,
E. C. FIELD,
Att'ys for Plaintiff.

Plaintiff's Mo. New Trial Overruled, Ex., Judgment.

And the court being advised, over-rules plaintiff's said motion for a new trial, to which ruling of the court the plaintiff at the time excepts, and thereupon the defendants' attorneys moves the court for judgment upon the verdict of the jury, which motion is sustained by the court.

It is therefore adjudged and decreed by the court that the plaintiff take nothing by its cause of action, and that the defendants recover of and from the plaintiff their costs in this behalf expended.

Appeal Prayed, Granted; 60 Days for Bill of Exceptions, 30 Days for Bond.

Whereupon, the plaintiff prays an appeal to the supreme court of Indiana, which is granted by the court, and the plaintiff is given sixty days in which to make and file its bill of exceptions herein, and the plaintiff is given sixty days in which to file its appeal bond herein in the sum of five hundred dollars, with James Murdock as surety thereon which surety is approved by the court.

Bond Filed.

And afterwards, towit:—

In Vacation, June 13th, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
54 PATRICK MCGUIRE and Others.

Comes now the plaintiff, by Sellers and Uhl, its attorneys, and files its appeal bond in the sum of five hundred dollars, with James Murdock as surety thereon, which bond has been heretofore approved by the court.

"Know all men by these presents, that we, Chicago, Indianapolis and Louisville Railway Company and James Murdock, are held and firmly bound unto Patrick McGuire, Philip Dellinger and M. M. Hathaway in the penal sum of five thousand dollars, to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 3rd day of June 1899.

The condition of the above obligation is such, that whereas, heretofore, towit: on the 19th day of May 1899, the said Patrick McGuire, Phillip Dellinger and M. M. Hathaway, in the White circuit court, recovered a judgment against the said Chicago, Indianapolis, and Louisville Railway Company for the sum of the costs in that behalf expended, for which said judgment of said White circuit court, the said Chicago, Indianapolis and Louisville Railway Company has taken an appeal to the supreme court of Indiana.

Now if the said Chicago, Indianapolis and Louisville Railway Company shall well and truly prosecute said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against it, then the above obligation to be null and void; otherwise to be and remain in full force and virtue in law.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, [SEAL.]
By E. C. FIELDS, *Gen'l Sol'r.* [SEAL.]
JAMES MURDOCK. [SEAL.]

55 *Long-hand Transcript of Evidence Filed.*

And afterwards, towit:

In Vacation, July 6th, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MCGUIRE ET AL.

Comes now Lucy S. Taylor, the official reporter of the White circuit court of Indiana, and files her long hand transcript of the evidence taken in this cause, which transcript is duly certified to by her and reads as follows, towit:—(follows in bill of exceptions.)

Plaintiff's General Bill of Exceptions Filed.

And afterwards, towit:

In Vacation, July 12th, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK McGUIRE, M. M. HATHAWAY, and PHILLIP DELLINGER, Sheriff Pulaski County, Indiana.

Comes now this 12th day of July 1899, the plaintiff, and files its general bill of exceptions, signed by Hon. James V. Kent, special judge, and embodying the long hand manuscript of the short hand reporter's notes of the evidence in above entitled cause which bill of exceptions is in the words and figures following, towit:—

56 *General Bill of Exceptions.*

STATE OF INDIANA, *County of White,* } *ss:*

In the White Circuit Court, April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
vs.
PATRICK MAGUIRE, MEDARY M. HATHAWAY, PHILIP Dellinger, Sheriff of Pulaski County, Indiana. } No. 902.

Appearances.

For the plaintiff: Geo. W. Kretzinger E. C. Field Sellers & Uhl.
For the defendants: Chas. C. Spencer M. Winfield Steis & Hathaway.

57 STATE OF INDIANA, *White County,* } *ss:*

In the White Circuit Court, to the April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE Railway Company
vs.
PATRICK MAGUIRE, M. M. HATHAWAY, Philip Dellinger, Sheriff of Pulaski County, Indiana, and ——. } Plaintiff's Bill of Exceptions No. —, Containing the Evidence and Rulings Relating Thereto.

Be it remembered, that on the 18 day of May, 1899 the above entitled cause came on for trial before the Honorable James V. Kent,

special judge of said court, and a jury; that on the trial of said cause and in support of the respective issues thereon, the following evidence was given to the jury trying said cause and the following rulings of the court were made in respect to the admission and rejection of evidence; and the objections and exceptions thereto were made and taken as noted therein, which evidence, objections thereto, rulings and exceptions, at the time the same were so delivered and given to the jury, and at the time said rulings of the court were made and at the time said objections were made, were taken down and reported verbatim and in full shorthand notes by Lucy S. Taylor, the official shorthand reporter of said court, duly sworn as such reporter, and the said reporter, after the conclusion of said trial and on the request of the plaintiff therein there for, made out and furnished said plaintiff with a transcript written out in longhand
58 of all the evidence given in said cause and of the objections, rulings and exceptions of which a verbatim report in shorthand had been made and taken by her as aforesaid, the said transcript being made in longhand manuscript of all the evidence given in said cause and the rulings of the court in the admission and rejection of evidence, with the objections and exceptions therein and thereto; which longhand manuscript, duly certified by said reporter to be a full, true and complete transcript of all the evidence and rulings, objections and exceptions so taken by her as aforesaid, was on the 6th day of July, 1899, filed by said reporter for plaintiff in the office of the clerk of said court as part of the record in said cause; and which said original longhand manuscript of said evidence, rulings, objections and exceptions is incorporated into this bill of exceptions and made a part thereof, and the same is in the words and figures following, to-wit:—

59 *Official Reporter's Transcript of the Evidence.*

Transcript of the evidence and proceedings in the cause of The Chicago, Indianapolis and Louisville Railway Company *vs.* Patrick Maguire, Medary M. Hathaway, Philip Dellinger, sheriff of Pulaski county, Indiana, in the White circuit court of the State of Indiana, April term, 1899, made by Lucy S. Taylor, the official reporter of said court, cause No. 902.

60 *Index.*

Plat. (Exhibit A.)..... 60
Decree of foreclosure, Bill *vs.* L. N. A. & C. Ry. Co. (Exhibit B.)..
Deed Record 30, page 297 *et seq*..... 62
Articles of association, (Exhibit C.)..... 75
Articles of consolidation, (Exhibit D.)..... 82
Mortgage record 25, page 194 *et seq*..... 93
Mortgage to Central Trust Co. May 1, 1890, (Exhibit E.)..... 119
Mortgage Record 41, page 75, *et seq*..... 159

Decree of foreclosure, in U. S. court, Farmers' Loan & Trust Co., and John H. Barker *vs.* L. N. A. & C. Ry. Co. (Exhibit F.) 198
Special master's final report of sale. (Exhibit G.) 231
Special master's deed, (Exhibit H.) 238
Deed from Alcott, Poor & Rouse to pl'ff. (Exhibit I) 246
Articles of association of the pl'ff Co., (Exhibit J) 256
Deed of Brooks to L. N. A. & C. Ry. Co. (Exhibit K.) 266
Deposition of James N. Hayworth 270
Samuel Petrie 295
" " (cross examination) .....
Photograph (Exhibit L) .....
Photograph (Exhibit M) .....
Robert Field .....
" " (cross examination) .....
Plaintiff rested its case .....
Amended complaint in case of Maguire *vs.* L. N. A. & C. Ry. Co. Filed Feb. 11, 1896 (Exhibit N.) .....
Admission as to answer, in same case .....
Order Book 41, pages 289, 290 .....
Order Book 41, pages 294 to 308, inclusive .....
Execution issued to sheriff Pulaski Co. (Exhibit O.) .....
61 Sheriff's deed, Exhibit P .....
Transcript of judgment. (Exhibit Q) .....
Execution Docket 17, pages 225, 225, 230, 230, 231 .....
Medary Hathaway .....
" " (cross examination) .....
Plat, (Exhibit T.) .....
Edmund Applegate .....
Defendants rested their case .....
Lease of L. N. A. & C. Ry. Co. to J. H. Prewett, (Exhibit R) .....
Lease of pl'ff Co. to Jacob Myers, (Exhibit S) .....
Plaintiff rested its case .....
Defendants rested their case .....
Reporter's certificate .....
Clerk's certificate .....
Judge's certificate .....

62 *Plat Offered.*

Plaintiff offered in evidence a certified copy of plat of the town of Francesville, Pulaski county, Indiana. Defendants objected to the introduction of the plat for the reasons, first: Mr. Allison signs himself as the proprietor of unsold lots; it is headed a new and replotted plat of the town of Francesville, Pulaski county, State of Indiana; he does not appear to be the owner of the grounds; he simply makes a replat of the town of Francesville; he makes what is called a new and replotted plat of the town of Francesville, as the

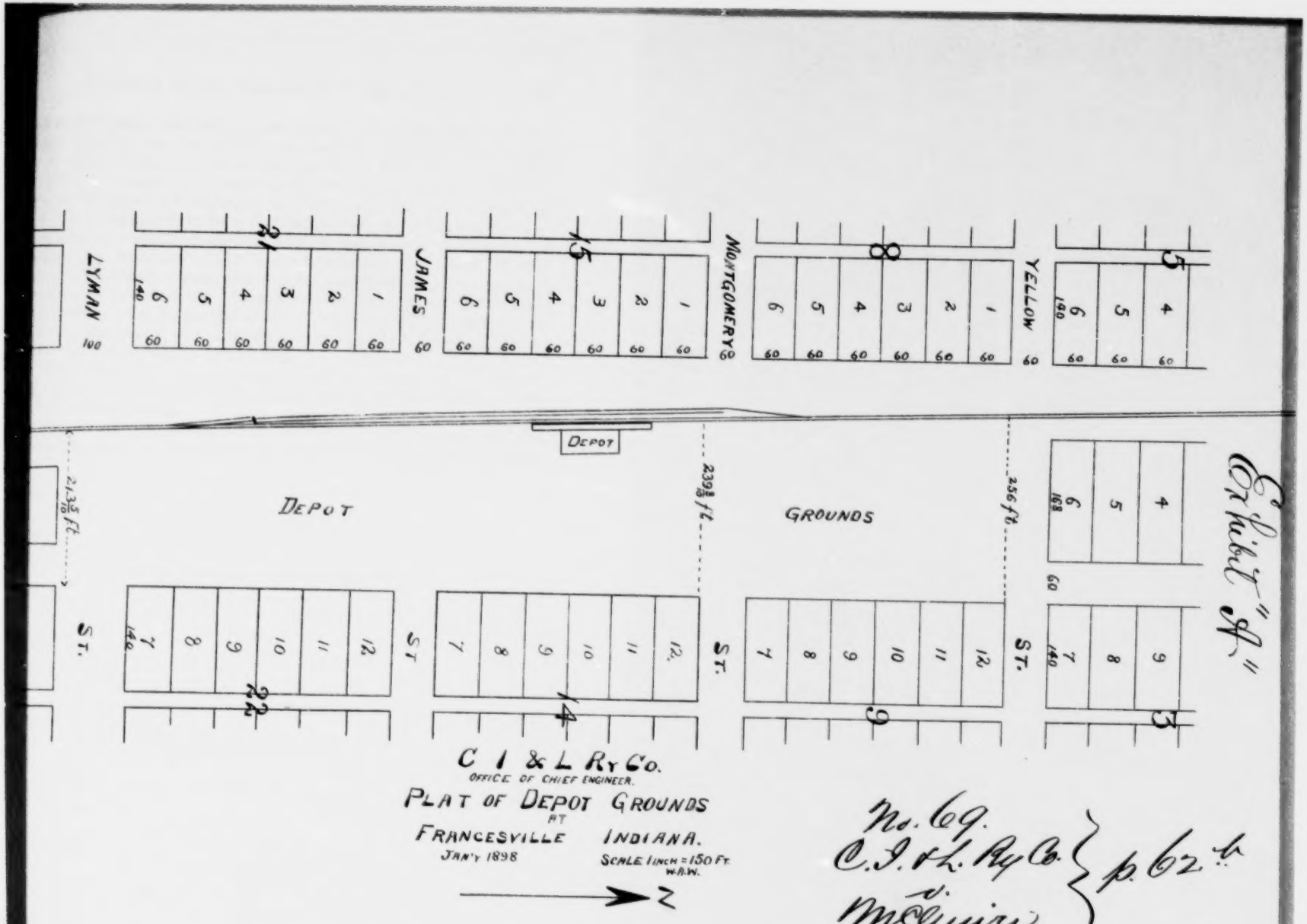


Exhibit "A"

No. 69.
C. I. & L. Ry Co. } p. 62 ½
McGuire

proprietor of unsold lots, and claims simply to be the owner of unsold lots; no one but the owner can dedicate lands either to the public or individuals, and there is no evidence here that he was the owner of the grounds; it is the duty of the railway company to back up its plat by previous evidence to show that he had a right to make what is supposed to be a dedication; second: Defendants objected to the introduction of this plat, because as a dedication of this ground in controversy, it is void, because the name of the grantee is not named; there can not be a dedication to a railroad corporation, at common law; it can only be by virtue of the statute, and the statute must be complied with. Third: It is void because there is no description of the lands; it would be impossible for a surveyor from this description to find the boundaries of this land.

The court sustained the objection, to which ruling of the court, the plaintiffs, at the time, excepted, and asked for ten days in which to file bill of exceptions.

The plat so offered (identified as Exhibit A) and refused by the court was the same as appears upon the following page of this transcript.

62*a* EXHIBIT "A."

(Here follows plat marked page 62*b*.)

63 Plaintiff offered in evidence a certified copy of the decree of foreclosure in the case of Charles E. Bill *versus* The Louisville, New Albany and Chicago Railroad Company, *et al.*, entered in 1872. (Identified by reporter as Exhibit B.)

The defendants objected to the introduction of the certified copy of the decree, on the ground, that there is nothing described in this decree except the lay-out of the road its right of way and such ground as it uses for railroad purposes. And secondly. That the owner of this ground is not made a party to this suit. There is no pretense in the decree that the persons owning this ground or ever having owned it were made parties to the suit to answer as to any rights that they may have to the land.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

And the said certified copy of the decree of foreclosure being then read and given in evidence was in the words and figures following, to-wit:

EXHIBIT B.

Decree of Foreclosure.

In the Circuit Court of the United States for the District of Indiana, November Term, 1872.

NOVEMBER 21", 1872.

Before the Honorable Thomas Drummond and the Honorable Walter Q. Gresham, judges.

64

CHARLES E. BILL *vs.* THE LOUISVILLE, NEW ALBANY AND CHICAGO Railroad Company, John Savage Shaw, Laura W. Shaw, Laura H. Shaw, Frank E. Shaw, Gideon Shaw, Helen Shaw; James E. Emerson, Administrator of Charles N. Emerson, Deceased; Blanch V. Babcock and Myron Babcock, Her Husband; Gideon Putnam and Stella C. Putnam, His Wife; Henry W. Shaw, and Avery V. Williams.	Chancery.	No. 58.

Now on this 21" day of November, 1872, this cause came on for final hearing on the amended supplemental bill of complaint filed herein on the 2" day of June, 1871, and the answer of the intervening defendants, John Savage Shaw, and others filed on September 4", 1871, the replication thereto, the default of the said railroad company, the report of the special master filed March 25", 1872, and the depositions and evidence adduced and at the same time the cross-

bill of John Savage Shaw, and others filed June 1", 1872, came on for final hearing upon the cross-bill, the answer of the said complain-t, Charles E. Bill, thereto, the replication and proofs adduced and the court having heard counsel thereupon and being sufficiently advised in the premises do now finally order, adjudge and decree that the said cross-bill of said John Savage Shaw and others filed on June 1", 1872, be, and the same is hereby dismissed absolutely for want of equity, and that the complainant recover costs.

65 And it is further adjudged and decreed that upon the said amended supplemental bill the equity of the cause is with the complainant; that the material allegations therein contained are true and that by reason of such matters the said complainant Charles E. Bill is entitled to the relief prayed at the foot thereof.

And the court finds and decrees from the evidence in the case and the report of the special master that there is now outstanding and due to the different holders of the ten per cent. bonds of the said railroad company issued under the trust mortgage dated February 8", 1851, the sum of one million, one hundred and ninety-six thousand eight hundred and sixty-eight dollars ($1,196,868.00), and that the said bonds by virtue of the said mortgage constitute a first and paramount lien on the property described therein.

And the court further finds and decrees that there is now outstanding and due to the different holders of the eight per cent. bonds of the said railroad company issued under the trust deed dated February 14", 1852, the sum of four million, nine hundred and thirty two thousand three hundred dollars ($4,932,300.00), and that said bonds by virtue of the said trust mortgage constitute a first and paramount lien on the property described therein subject only to the lien and priority of the mortgage of February 8", 1851, as aforesaid.

And the court further finds that the said several sums aforesaid are justly due and unpaid from the said Louisville, New Albany and Chicago Railroad Company to such different bond creditors, that the said corporation is insolvent and that it has no assets other than the property specifically described in the said two trust mortgages, which mortgaged property is not sufficient to pay the

66 debts charged upon it by such mortgages, and that in consequence of such default the said mortgages should be foreclosed and the property sold to realize the said debts.

And the court further finds that all the said sums so secured by the said two mortgages and by the terms of said bonds and mortgages are due and payable without relief from valuation or appraisement laws.

For the purpose therefore of finally closing the trusts embraced in the said two mortgages and securing the application of the proceeds of all and singular the mortgaged property to the satisfaction and payment of the just debts of the said bond creditors as they are hereinbefore found and adjudged.

It is ordered and decreed that the said two mortgages be fore-

closed and that all and singular the line of railroad running from New Albany in the county of Floyd, through the counties of Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, and La Porte, to Michigan City, and being of the length of two hundred and eighty-eight miles or thereabouts; that is to say:

The said railroad as at present constructed and operated including the right of way and land occupied thereby together with the superstructure and tracks thereon, engines, tenders, cars, tools, materials, equipments, machinery, furniture, and all other real and personal property appurtenant to the said line of railroad and used for the purpose of operating the said line of railroad together with the tools, income and revenues levied therefrom and the franchises to maintain and operate the same be sold as an entirety, and without any relief from valuation or appraisement laws at public auction to the highest bidder at the court house door in the city of
67 New Albany, Indiana, where the principal office of the said company is situated upon such notice by advertisement in some newspapers of general circulation published at New Albany, and at Indianapolis, Indiana, for the length of time required by the laws of the State of Indiana, and the rules of this court in case of the sale of real estate on execution and upon such sale it is ordered that the equity of redemption of the said Louisville, New Albany and Chicago Railroad Company, and all claiming under it, and of the said intervening defendants, in and to the said property hereby directed to be sold and each and every part thereof be forever barred and foreclosed.

And it is further ordered that John D. Howland, Esq., be, and he is hereby appointed special commissioner, and invested with full power and authority to execute this decree by the sale and conveyance of the said railroad property appurtenances, franchises as herein provided; and he is directed and required upon receiving a certified copy of this decree to proceed to execute the same with all reasonable speed by giving the notice and making the sale of said property on the terms and in the manner herein specified.

On the sale of said property the terms shall be cash in hand on the day of such sale unless the property is bought in by the holders of said eight and ten per cent. bonds or the agent or attorney of such bond creditors in which case the said special commissioner shall be authorized and required to receive in *pro rata* payment of such bid and purchase money (except as to all costs and expenses of sale justly chargeable against the said proceeds of sale, all which costs and expenses must in case of any bid be paid in cash) the
68 surrender and delivery to him of the said ten per cent. and eight per cent. mortgage bonds, to be credited on such bid in the following proportion, that is to say:

Each ten per cent. bond and accompanying coupons to be entitled to its proper proportion of one hundred and thirteen, two hundred and eighty eights (113 / 288) of the amount of said purchase money

after deducting the costs and expenses of sale. Each eight per cent. bond and accompanying coupons to be entitled to its proper proportion of one hundred and seventy five, two hundred and eighty eights (175/288) of the amount of such purchase money after deducting costs and expenses of sale.

And on the payment of such bid at such sale either in cash or in bonds in compliance with the terms of this decree, it is ordered that the said special commissioner do make, execute, acknowledge and deliver to the purchaser at such sale a good and sufficient conveyance vesting in the said purchaser or purchasers in fee simple absolute all and singular the said line of railroad, appurtenances, equipment and franchises which are directed to be sold hereby, and on the delivery of the said deed of conveyance to the said purchaser or purchasers at such sale, he or they shall forthwith be let into the quiet and exclusive possession and enjoyment of all and singular the said property so purchased by them.

And the said special commissioner is directed to report to the court his doings in the premises, and to pay into court after deducting the expenses of sale all of the moneys and bonds which may have been received by him upon such sale.

And it is further ordered and directed that the complainant do have and recover of the intervening and answering defendants John Savage Shaw and others the costs of this action growing out of and after the issues tendered by the said answers, the said costs to be taxed by the clerk.

69

And the defendant intervenors herein pray an appeal to the Supreme Court, which is allowed (without supersedeas) in their entering into bond according to law with security to be approved by the court in the penal sum of two thousand dollars.

DISTRICT OF INDIANA:

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the decree made and entered in said court on the 21" day of November, 1872, in the cause of Charles E. Bill *vs.* The Louisville, New Albany and Chicago Railroad Company, *et al.*, No. 58, as fully as the same appears of record in my office.

Witness my hand and seal of said court, this 15" day of December, 1898.

[L. S.] NOBLE C. BUTLER, *Clerk.*

70 DISTRICT OF INDIANA:

I, John H. Baker, judge of the district court of the United States, for said district, do certify that at the date of the foregoing certificate, Noble C. Butler was, and now is, the clerk of the circuit court

of the United States, for said district, and that his attestations aforesaid is in due form of law.

Witness my hand, this 15" day of December 1898.

JOHN H. BAKER, *Judge.*

71 *Deed from Howland to Talman.*

Plaintiff offered in evidence Deed Record No. 30, at page 297, (it being admitted by the parties that the records introduced in evidence are records on file in the office of the recorder of White county, Indiana), the record offered being a deed from Howland, special master, to Talman.

Defendants objected to the introduction of this deed, for the reason that the master's deed, approved therein by the court does not establish any title to this land; it is not sufficient; secondly, because there is nothing described in that deed except the lay-out of the road.

The court overruled the objection, to which ruling of the court, the defendants, at the time excepted.

And the said deed being read and given in evidence was in the words and figures following, to-wit:

This indenture, made and entered into this twenty seventh day of December, in the year of our Lord, one thousand eight hundred and seventy two, between John D. Howland special commissioner party of the first part and George F. Talman, Frederick Schuchardt, James H. Banker, Edward Minturn, Moses Taylor, Charles T. Leverich, and John Steward, parties of the second part, witnesseth, that whereas on the twenty-first day of November, 1872, by the consideration of the circuit court of the United States, within and for the district of Indiana, a decree of foreclosure was duly rendered and enrolled in the records of said court in a certain action therein pending on the equity side thereof wherein Charles E. Bill as alternate trustee was complainant, and The Louisville, New Albany and Chicago Railroad Company, and others were defendants, by which decree its was adjudged that the said railroad company had by her original corporate name of the New Albany and Salem Railroad Company, duly executed and delivered

72 the two trust mortgages of February 8, 1851, and February 14, 1852, conveying and assuring to the said Bill as such alternate trustee all and singular the property, appurtenances, incomes, tolls, right and franchises enumerated in the said two trust conveyances, and that under the said trust mortgage, dated February 8, 1851, there was due for principal and interest of the bonds issued thereunder, and outstanding at the date of said decree, of the sum of one million, one hundred and ninety six thousand, eight hundred and sixty eight, ($1,196,868.00) dollars, collectible without relief from valuation or appraisement laws; that under the

said trust mortgage, dated February 14, 1852, there was due for *due for* principal and interest of the bonds issued thereunder and outstanding at the date of said decree, the sum of four million nine hundred and thirty two thousand three hundred dollars, ($4,932,300.00) collectable without relief from valuation or appraisement laws. And the said decree further ordered that in as much as the conditions of said two trust conveyances had been broken, for the purpose of effectuating the trusts contained in the said instruments, and realizing the several sums due as aforesaid under the said mortgages, the entire property embraced therein viz: all and singular the line of railroad running from New Albany in the county of Floyd, through the counties of Clark, Washington, Orange Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, and La Porte to Michigan City, and being of the length of two hundred and eighty-eight miles, or thereabouts, that is to say the said railroad as now constructed and operated including the right of way and land occupied thereby, together with the superstructure and tracks thereon, engines, tenders, cars, tools, materials, equipments, machinery, furniture, and all other real and personal property, appurtenant to the said line of railroad and used for
73 the purpose of operating the said line of railroad together with the tolls, income, and revenues to be levied therefrom and the franchises to maintain and operate the same should be sold as an entirety and without relief from valuation or appraisement laws, and that upon such sale the equity of redemption of said railroad company and all the other defendants to said action should be barred and foreclosed. And the said decree further ordered that such sale should be by public auction at the court house door in the city of New Albany, Indiana, upon such notice by advertisement — newspapers, published at New Albany and Indianapolis for the length of time required by the laws of the State of Indiana, and the rules of said court, in case of the sale of ordinary real estate on execution, and that said John D. Howland should be appointed special commissioner to execute such decree by making said sale and executing, acknowledging and delivering a conveyance to the purchaser, and the manner specifically pointed out in the said decree. And whereas, the said special commissioner as directed — the said decree, proceeded on the receipt of a certified copy thereof to advertise the sale of said property by advertisements for more than three weeks published in the Albany Ledger-Standard a newspaper of general circulation published at New Albany, Indiana, and in the Indianapolis Journal, a newspaper of general circulation, published at Indianapolis, Indiana, in the manner required by law, and in all respects in conformity with said decree and said party of the first part, in obedience to the command of said decree and the terms, advertisements, proceeded at the hour of one o'clock p. m. on the twenty-seventh day of December A. D. 1872 at the court house door in the city of New Albany, Indiana, to sell at public auction to the highest

bidder, all and singular the said line of railroad,
74 appurtenances and franchises so directed to be sold as aforesaid, and having offered first for sale the rents, and profits of said property for a term of years not exceeding seven and receiving no bid therefor, did then offer the fee simple of all and singular the said mortgaged property and franchises embraced in the said decree, as an entirety, and said parties of the second part bid therefor, the sum of five thousand dollars and that sum being the highest and best bid for the said property the same was struck off to said parties of the second part as the purchasers thereof. And whereas, the said parties of the second part have fully paid the said sum so bid by them as aforesaid in accordance with the provisions of the said decree of foreclosure. Now therefore, in consideration of the premises and the payment by said parties of the second part of the purchase money so bid by them as aforesaid, the said John D. Howland as such special commissioner and by virtue of the authority vested in him by the said decree doth by these presents bargain, sell, convey and confirm unto the said George F. Talman, Frederick Schuschardt, James H. Banker, Edward Minturn, Moses Taylor, Charles P. Leverich and John Steward all and singular the property hereinbefore described viz: the entire line of railroad of the said Louisville, New Albany and Chicago Railroad Company running from New Albany in the county of Floyd northwardly through the counties of Clark, Washington, Orange, Lawrence, Monroe, Owen, Putman, Montgomery, Tippecanoe, White, Pulaski, Starke and La Porte to Michigan City and being of the length of 288 miles or thereabouts as at present constructed and operated including the right of way and land occupied thereby, the superstructure and tracks thereon, bridges, culverts, fences, depot ground and buildings thereon, engines, tenders, cars, tools, materials, machinery, furniture and
75 all other real and personal property appurtenant to the said line of road in use for the purpose of operating the same together with the franchises to maintain and operate the same, and collect tolls, and income therefrom to have and to hold the same in fee simple unto the parties of the second part and their heirs and assigns forever.

In witness whereof, the said party of the first part hath hereunto subscribed his name and affixed his seal the day and year first above written.

J. D. HOWLAND, [SEAL.]
Special Commissioner.

STATE OF INDIANA, }
Floyd County, } ss:

Before me a notary public in and for said State and county personally appeared the within named John D. Howland, and as such special commissioner duly acknowledged that he executed and delivered the within conveyance to and for the uses and purposes therein expressed.

Witness my hand and official seal this 27th day of December, 1872.

[L. S.] WM. J. HISEY,
Notary Public.

Recorded April 24" 1873, at 3 o'clock p. m.
Attest: WM. W. McCULLOCH, *R. W. C.*

76 *Articles of Association.*

Plaintiff offered in evidence a certified copy of the articles of association of the Louisville, New Albany and Chicago Railway Company, dated January 7th, 1873. (Identified by the reporter as Exhibit C.)

The defendants objected to the introduction of the articles of association, because they are immaterial, and there is nothing in the foreclosure and the proceedings had thereunder that gives this corporation any title to the lands in controversy.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted, and the said articles of association being then read and given in evidence, were in the words and figures following, to-wit:

EXHIBIT C.

UNITED STATES OF AMERICA, }
State of Indiana. }

OFFICE OF SECRETARY OF STATE.

I, William D. Owen, secretary of state of the State of Indiana, hereby certify that the annexed pages contain a full, true and complete copy of the articles of association or agreement in writing, of Louisville, New Albany and Chicago Railway Company, with the several certificates thereon, filed January 7, 1873, as the same appears on file, as the law directs, in this office.

In testimony whereof, I hereunto set my hand and affix the great seal of the State of Indiana. Done at my office, in the city of Indianapolis, this 17" day of December, A. D. 1898.

[L. S.] WILLIAM D. OWEN,
Secretary of State.

77 Know all men by these presents. that, whereas the New Albany and Salem Railroad Company, was organized in the year A. D. 1847, under and in pursuance of a public act of the General Assembly of the State of Indiana, approved Jan. 28, 1842, and under the provisions of said act and the amendments thereto, the said railroad company located and constructed a line of railway

from the city of New Albany in the county of Floyd northwardly through the counties of Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, and La Porte to Michigan City, all in the said State of Indiana and being of the length of about 288 miles

And whereas, the said corporation as by law thereto authorized. under its corporate seal executed and delivered to one Douw. D, Williamson as trustee two certain trust mortgages, embracing and conveying all and singular the said line of railroad, together with all its property, equipment and appurtenances, and the franchise to maintain and operate the same and levy and collect tolls therefrom, which said mortgages were severally dated on February 8, 1851, and February 14, 1852, and were given to secure the payment of two issues of bonds which were executed and put into circulation for value by the said railroad company.

And whereas, on the 24th day of October, 1859, the corporate name of said company was changed under the authority of the statutes of the State of Indiana, to the Louisville, New Albany and Chicago Railroad Company.

And whereas the said Douw. D. Williamson trustee as aforesaid departed this life in the year 1869, and the duties powers and estate created and vested by the said two mortgages, became vested in the alternate trustee named in the said two trust mortgages viz.
78 Charles E. Bill of the city and State of New York.

And whereas, on the 21st day of November A. D. 1872, the said Charles E. Bill being such trust mortgagee as aforesaid by the consideration of the circuit court of the United States within and for the district of Indiana duly recovered a decree of foreclosure of the said two mortgages hereinbefore mentioned, and an order for the sale of the entire line of said railroad from New Albany to Michigan City as aforesaid together with its property, equipment and appurtenances of every description, and also the franchises to operate the same, and levy and collect tolls thereon and whereas on the 27th day of December A. D. 1872 all and singular the said line of railroad from New Albany to Michigan City inclusive as then located, constructed and operated, including the right of way and the land occupied thereby together with the superstructure and tracks thereon, bridges, culverts, fences, depot grounds and buildings thereon, engines, tenders, cars, tools, materials, machinery, furniture and all other real and personal property appurtenant to the said line of road and used for the purpose of operating the same, together with the franchise to operate the same and levy and collect tolls therefrom under the original charter of said railroad company and the subsequent amendments thereto, was sold at the court house door in the city of New Albany, Indiana by John D. Howland, special commissioner in due accordance with the requirements of said decree of November 21, 1872, and as provided by law, and was then and there purchased by George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn,

Charles P. Leverich and John Steward, with the design of forming a corporation under the laws of the State of Indiana as is hereinafter stated.

79 And whereas, the said John D. Howland as such special commissioner did on the said 27th day of December 1872, execute acknowledge and deliver to said purchasers a deed of conveyance of all and singular the property so purchased by them as aforesaid, by virtue whereof the title to all said property and franchises has become vested in fee simple absolute in the said purchasers who are subscribers hereunto.

Now therefore, for the purpose of carrying out the design of the said purchase and forming a corporation of the State of Indiana which shall of right possess and enjoy all the powers, rights, privileges, immunities and franchises in respect to the said line of railroad so conveyed to and vested in the undersigned which were at any time possessed and enjoyed by the said New Albany and Salem (lately the Louisville, New Albany & Chicago) Railroad Company, under its original charter and the amendments thereto, the said purchasers, under the authority and in accordance with the provisions of the statutes of the State of Indiana in relation to the purchase of railroads and especially under the requirements of an act of the General Assembly of the State of Indiana entitled, "An act to authorize regulate and confirm the sale of railroads, to enable purchasers of the same to form corporations, and to exercise corporate powers and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads and to operate and maintain the same," approved March 3rd, 1865—and a certain act supplemental thereto which was approved December 20, 1865, do by these articles of association by them subscribed, form and constitute themselves into a corporation which shall be called

"The Louisville, New Albany & Chicago Railway Company,

80 and the said corporation by the name aforesaid, on the filing of these articles in the office of the secretary of state shall by virtue thereof have, possess and enjoy the said line of railroad from New Albany to Michigan City and all its appurtenances and equipments as specifically set out in the conveyance to the undersigned as the exclusive property of the said corporation hereby created, and the said corporation shall also have exercise and enjoy all and singular the powers, rights, privileges, immunities and franchises in respect to said line of railroad as completely in every respect as the same were held, exercised and enjoyed by the said Louisville, New Albany & Chicago Railroad (formerly the New Albany and Salem Railroad) Company, under its original charter and the amendments thereto, and as the same were vested in the undersigned by the conveyance aforesaid.

The number of directors shall be thirteen (13) and the following persons are constituted the first board of directors to continue in office until the 1st day of January 1874, George F. Talman, Moses Taylor, Frederick Schuchardt, James H. Banker, Edward Minturn,

Charles F. Leverich, John Steward, James F. Joy, George S. Schuyler, John Jacob Astor, Roswell G. Ralston, Johnathan T. Wells and Isaac Bell.

The capital stock of the said corporation shall be and is hereby fixed at the sum of three millions of dollars, divided into thirty thousand shares of one hundred dollars each.

In witness whereof the said incorporators have hereunto set their hands and seals this 31st day of December 1872.

GEO. F. TALMAN. [SEAL.]
FRED'K SCHUCHARDT. [SEAL.]
CHAS. P. LEVERICH. [SEAL.]

81

JOHN STEWARD. [SEAL.]
MOSES TAYLOR. [SEAL.]
EDWARD MINTURN. [SEAL.]
JAMES H. BANKER. [SEAL.]

STATE OF NEW YORK, }
City and County of New York, } ss:

Before me a notary public in and for said county and city, personally appeared the above named incorporators, George F. Talman, Frederick Schuchardt, James H. Banker, Moses Taylor, Edward Minturn, Charles P. Leverich, and John Steward and acknowledged the execution of the above articles of association as their act and deed for the purposes therein specified.

Witness my hand and official seal this 2nd day of January, 1873.

[SEAL.] W. D. SEARLS, *Notary.*

Filed Jan'y 7, 1873. John G. Farquhar, secretary of state. Box 406. Paper 7. Articles of association of the Louisville, New Albany and Chicago Railway Company. Received Jan. 7, 1873. Office sect. state.

82 *Articles of Consolidation.*

Plaintiff offered in evidence a certified copy of the articles of consolidation between the Louisville, New Albany and Chicago Railway Company and the Chicago and Indianapolis Air-line Railway Company, dated August 10th, 1881. (Identified by the reporter as Exhibit D.)

Defendants objected to the introduction of the articles of consolidation, because the instrument does not tend to prove any right that the plaintiff has to the property in controversy and does not tend to support any of the issues in the case.

The court overruled the objection, to which ruling of the court the defendants, at the time, excepted.

And the said articles of consolidation being then read and given in evidence were in the words and figures following, to-wit:

EXHIBIT D.

Certificate.

STATE OF INDIANA, } ss:
Office of the Secretary of State, }

I, William D. Owen, secretary of state of the State of Indiana, do *hereby certify that the attached is a full, true and complete copy of* the articles of consolidation of the Louisville, New Albany & Chicago Railway Company and the Chicago & Indianapolis Air Line Railway Company as filed in this office on August 10, 1881, and which articles of consolidation now form a part of the records of this office, in accordance with the laws of the State of Indiana in such case made and provided.

In witness whereof, I have hereunto set my hand and affixed
83 the seal of the State of Indiana, at the city of Indianapolis, this 17" day of December, A. D. 1898.

WILLIAM D. OWEN,
[L. S.] *Secretary of State.*

Articles of Consolidation Between the Louisville, New Albany and Chicago Railway Company and the Chicago and Indianapolis Air Line Railway Company.

This agreement made this fifth day of May A. D. 1881, between the Louisville, New Albany and Chicago Railway Company, as party of the first part and the Chicago and Indianapolis Air Line Railway Company, as party of the second part—

Witnesseth, that whereas the party of the first part is a corporation existing under the laws of the State of Indiana with a share capital of $3,000,000 and has constructed owns and operates a line of railroad extending from the city of New Albany, Floyd county, Indiana to Michigan City, La Porte county in the same State, and

Whereas, the said party of the second part is a consolidated corporation, organized and existing under the laws of the States of Indiana and Illinois with a share capital of $2,000,000, and has in process of construction a line of railway extending from the city of Indianapolis, Marion county, Indiana, to a connection with a railroad at, or near Glenwood, Cook county Illinois, so as to secure connection with and entrance to the city of Chicago, Illinois, and

Whereas, the lines of railroad so described as aforesaid and belonging respectively to said parties of the first and second parts, intersect and connect with each other at Bradford, White county, Indiana,

so as to allow the free interchange of traffic between each
84 other, and if joined, united and consolidated, would form a line of railroad connected from the cities of New Albany and Indianapolis, Indiana, to the city of Chicago in the State of Illinois, and

Whereas, the union, merger and consolidation of said two lines of railroad appurtenances and franchises so as to form a corporation under one ownership and control, will enable the said properties to be operated with more efficiency and economy, and with greater benefit to the respective shareholders and to the public, and

Whereas, the said parties hereto have full powers and authority under the laws of the State of Illinois and Indiana, to consolidate their stocks and properties, and it is desired to effect such union, merger and consolidation between the said parties of the first and second parts upon such equitable terms and basis as would recognize the rights of the shareholders in said two corporations and equalize the dissimilar values of the two different lines of railroads and properties

Now therefore, in consideration of the premises and to effectuate the purposes aforesaid, the said parties of the first and second parts do hereby mutually covenant and agree with each other as follows, viz:

Article 1. The said parties of the first and second parts do hereby, subject to the approval of their respective boards of directors and shareholders as hereinafter specified, severally agree to and with each other, to unite, merge and consolidate the said two corporations and all their railroads, properties, stocks and franchises of every kind so as to create and form a consolidated corporation, to be called and known as the "Louisville, New Albany and Chicago Railway Company" on the terms and conditions hereinafter specified—that is to say.

85 Article 2. By this agreement and act of consolidation, when ratified and approved by the respective boards of directors and the stockholders of both parties hereto, the said parties of the first and second parts, convey, assign transfer to and vest in the consolidated corporation, so created, all and singular the respective lines of railroads, with all their lands, rights of way, leases, leasehold rights, equipments, machinery, contract rights, licenses, stations, moneys, books, papers, records, choses in action rights, franchises, privileges and immunities and all property of every kind, real personal or mixed and whether held in possession, reversion or remainder, and wherever situate; and the said parties hereto, do agree and declare, that all and singular such railroads, properties and franchises shall, from the date of the consummation of this consolidation, thenceforth be held, owned, managed, enjoyed and aliened by the said consolidated corporation hereby created, and to and for its own use, benefit and behoof, to all intents and purposes, as fully and completely as the said respective parties hereto can or do now own, hold, use possess, enjoy or control the same, and the

parties hereto do respectively covenant and agree each with the other, that they will execute, seal acknowledge and deliver to such consolidated corporation, and and all such further or other deeds, assignments or writings as may be necessary or proper to carry out the true intent and meaning of this agreement, and by way of further assurance of title to said property, assets and franchises, or any of them.

Article 3. The said consolidated corporation hereby created shall be vested, with all the rights, privileges, immunities and franchises which usually pertain to railroad corporations under the
86 laws of the respective States of Illinois and Indiana wherein the lines of its railroad are situate, and shall also be vested with all and singular the rights, powers, privileges, immunities, capacities and franchises which before the execution of these articles was lawfully possessed or exercised by either of the parties hereto.

Article 4. The capital stock of the consolidated corporation hereby created shall be, until changed by some manner according to law, five million dollars ($5,000,000), being the sum total of the existing share capital of the first and second parties hereto and it shall be divided into fifty thousand shares of one hundred dollars par value each, and each holder of the stock in either of the parties hereto shall from the date of the legal consummation of this consolidation, be held and considered a shareholder in the consolidated corporation, which is created by these presents, in the proportion, to the extent and in the manner in the next articles stated.

Article 5. In order to equalize the different values of the respective stocks of the parties of the first and second parts it is agreed, that the stockholders of the party of the first part shall be entitled to receive for their entire interest legal and equitable in the capital stock of the party of the first part, $3,450,000 of the capital stock of the consolidated corporation being 34,500 shares of the par value of one hundred dollars each, deliverable on the surrender of the stock certificates of the said party of the first part now outstanding to be distributed among them in proportion to the stock held by them in the party of the first part and surrendered by them respectively upon the consolidation.

And likewise it is agreed that the stockholders of the party
87 of the second part, or such person or persons as they may authorize to receive them, shall be entitled to receive for the entire interest of said stockholders, legal and equitable, in the capital stock of the consolidated company $1,550,000 of the capital stock of said consolidated corporation, being 15,500 shares of the par value of one hundred dollars each, deliverable on the surrender of any and all stock certificates of the party of the second part now outstanding.

The certificates of the shares of the capital stock of the consolidated corporation so created shall be issued to the persons entitled thereto on demand and the surrender by them of the certificates held by

them in the capital stock of the parties hereto in the proportion as above recited in this article.

Article 6. It is further distinctly agreed that for the purpose of carrying out the provisions of the pending consolidation contract whereby the line of railroad of the party of the second part is being built the said consolidated corporation as soon as it comes into being, shall issue its coupon bonds to the amount of two millions three hundred thousand dollars, bearing six per cent. interest payable semi-annually, both principal and interest to be payable in gold coin of the United States of the present standard weight and fineness and to be secured by a mortgage to some proper trustee or trustees, which shall be a first lien on the railroad from Indianapolis to its Chicago terminus and the equipment and appurtenances thereto belonging.

Of such bonds one million eight hundred and fifty thousand dollars are to be used in payment under such construction contract and four hundred and fifty thousand dollars of such bonds, for
88 the equipment for said Chicago and Indianapolis division and to the general purposes of said consolidated corporation.

Article 7. The business and affairs of the consolidated corporation hereby created shall be managed by a board of directors to be annually elected according to law on such date and at such place as may be appointed by the by-laws of the consolidated company and until the first election the board of directors of the consolidated corporation shall be composed of the present board of directors of the party of the first part.

Article 8. The present by-laws and the present common or corporate seal of the party of the first part shall be until changed according to law, *be* the by-laws and corporate seal of the consolidated corporation hereby created.

Article 9. The principal place of business and the general office of the consolidated corporation shall be established in the city of Louisville, Kentucky, and the books vouchers, instruments of title, records, cash, evidences of debt, contracts and all papers and documents pertaining to the property or business of either of the parties hereto, shall at once be delivered to the proper officer or agent of the consolidated corporation and the said books records and papers shall be deemed and taken as far as necessary or desired as the records and books of said consolidated corporation.

Article 10. These articles of consolidation shall become consummated and go into effect, and the consolidated corporation so created, shall come into existence only after due and legal ratification of these presents by the respective boards of directors and the shareholders of the parties hereto. It is hereby expressly agreed that the above and foregoing instrument is to be submitted as
89 soon as the same can legally and properly be done to the respective boards of directors and the shareholders of the parties hereto, and if thereupon these presents are not ratified the same are to become void and of no effect.

In witness whereof, we have hereunto set our hands the day and year first above written.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
By R. S. VEECH, *President.*

[Corporate Seal.]

Attest: W. H. LEWIS, *Sec.*

CHICAGO & INDIANAPOLIS AIR LINE RAILWAY COMPANY,
By P. M. KENT, *President.*

[Corporate Seal.]

Attest: W. A. STARIN, *Sec.*

90 STATE OF NEW YORK, }
City and County of New York, } *ss:*

I, Richard S. Veech do hereby certify that I am the president of the Louisville, New Albany and Chicago Railway Company and that the articles of consolidation between the above named corporation and the Chicago and Indianapolis Air Line Railway Company of which the foregoing and annexed paper is a full and true copy were approved by the board of directors of said Louisville, New Albany & Chicago Railway Company on the 7th day of June, 1881, who at a meeting on that day reccommended to the stockholders of said last named company to adopt the said consolidation and at the same time directed the president to call a meeting of stockholders to be held not less than thirty days after due notice according to the laws of Indiana.

And I do further certify that at a meeting of the stockholders of said Louisville, New Albany and Chicago Railway Company duly called and held on the 18th day of July, 1881, the said articles of consolidation were duly approved by the affirmative vote of twenty two thousand and seventeen shares being all the shares represented at said meeting and constituting more than two-thirds of all the stock of said corporation, and by the resolution and proceedings of said stockholders' meeting the board of directors, were authorized to carry out and consummate the said consolidation.

And I do further certify, that at a meeting of the directors of the said Louisville, New Albany and Chicago Railway Co. held on the 19th day of July, 1881, the said directors authorized and directed me as president of said last named company to consummate the said consolidation, according to the terms of the said articles of consolidation annexed hereto as aforesaid.

91 Wherefore, I, do further certify and declare by virtue of the said approval and ratification of the said articles of consolidation and by virtue of the authority in me vested as aforesaid,

the said articles of consolidation of which the said annexed and foregoing paper is a full and true copy has become fully approved and consummated and has gone into effect and is the true contract of consolidation.

R. S. VEECH.

Subscribed and sworn to before me, this sixth day of August, A. D. 1881.

Witness my hand and seal of office.

[SEAL.] S. G. LEATHEM,
Notary Public, New York County.

STATE OF ILLINOIS, }
Cook County, } ss:

I, Phineas M. Kent do hereby certify that I am president of the Chicago & Indinapolis Air Line Railway Company and that the within and foregoing articles of consolidation were duly and legally ratified at a special meeting of the stockholders of said corporation duly called and held at Chicago, Ill. on May 11, 1881, by the affirmative vote of 20,000 shares being all the stock of said corporation.

Witness, my hand and seal of said corporation, this 8th day of August, 1881.

[SEAL.] PHINEAS M. KENT.

Attest.
WM. A. STARIN, *Secretary.*

Sub-cribed and sworn to before me a notary public in and for said State and county Aug. 8th, 1881.

92 Witness my hand and official seal.

[SEAL.] WM. A. STARIN,
Notary Public.

Fled August 10. 1881.
E. R. HAWN, *Sec'y of State.*

Box 660. Pa. 16.

Articles of consolidation between the Louisville, New Albany & Chicago Railway Company and the Chicago & Indianapolis Air Line Railway Co.

93 *Mortgage Rec. No. 25, p. 194.*

Plaintiff offered in evidence Mortgage Record No. 25, at page 194 (it being admitted by the parties that the records introduced in evidence are records on file in the office of the recorder of White county, Indiana.

Defendants objected to the introduction of this mortgage in evidence, on the ground that there is nothing described in the mort-

gage except the property then occupied and used by the railway company for railroad purposes and such other property as it might thereafter acquire for railroad purposes, and does not describe this property, and for the further reason that the owner of these lands was no party to this mortgage.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

And the said mortgage being then read and given in evidence was in the words and figures following, to-wit:

This indenture, made and entered into this first day of January, one thousand eight hundred and eighty-six, by and between the Louisville, New Albany and Chicago Railroad Company, hereinafter called the railway company, a corporation duly created and existing under the laws of the States of Indiana and Kentucky, party of the first part, and the Farmers' Loan and Trust Company, a corporation duly created and existing under the laws of the State of New York, and John H. Barker of Michigan City, in the State of Indiana, hereinafter called the trustees, parties of the second part:

Whereas, the party of the first part owns and is operating a railroad in the State of Indiana, which is composed of a line from New Albany, on the Ohio river to Michigan City, on Lake Michigan, hereinafter called the main-line, and a line from Indianapolis to a junction with the Chicago and Western Indiana railroad, at
94 a point on the State line between Indiana, and Illinois about twenty miles southwest of Chicago, hereinafter called the air-line, together with certain proprietary and leasehold interests in the franchises and railroad of the said Chicago and Western Indiana Railroad Company, and terminal facilities of the said company in the city of Chicago, and certain terminal rights, facilities and approaches in the other cities above mentioned and in the city of Louisville, in the State of Kentucky, and between said city of Louisville, and the city of New Albany; and

Whereas, the said railroad is subject to the following liens, that is to say:

First. The main-line is subject to the lien of a mortgage, made July first, 1880, by the party of the first part to John C. New, of Indianapolis, and Washington C. De Pauw of New Albany, in the State of Indiana, as trustees, to secure three million dollars—$3,000,000—of bonds, bearing date July first, 1880, payable July first, 1910, with interest at the rate of six per cent. per annum.

Second. The air-line is subject to the lien of a mortgage, made August 10, 1881, by the party of the first part to John C. New of Indianapolis, as trustee to secure two million three hundred thousand dollars—$2,300,000—of bonds, bearing date August 10th, 1881, and payable August first 1911, with interest at the rate of six per cent. per annum.

Third. The whole road is subject to the lien of a mortgage made February first, 1883, by the party of the first part to the Farmers'

Loan and Trust Company, of New York, W. M. Lewis, of New Albany, as trustees, to secure one million dollars—$1,000,000,—of bonds, bearing date February first, 1883, and payable February first, 1888, with interest at the rate of six per cent. per annum.

Fourth. The whole railroad is subject to a lien of a mort-
95 gage, made by the party of the first part, made March 24th, 1884, to the Farmers' Loan and Trust Company and W. M. Lewis, of New Albany, as trustees, to secure three million dollars—$3,000,000,—of bonds, bearing date March 24th, 1884, and payable April first, 1914, with interest at the rate of six per cent. per annum.

One million dollars,—$1,000,000—of the last mentioned three million dollars,—$3,000,000—of bonds are required by the terms of the said mortgage, to be delivered to the Farmers' Loan and Trust Company as trustees, to be ex-hanged for bonds secured by and under the one million dollar—$1,000,000,—mortgage of February first, 1883, above described and have been so delivered.

Fifth. The whole of said liens, after making the provision last aforesaid, amount to eight million three hundred thousand dollars,—$8,300,000,—

Whereas, at a meeting of the board of directors of the said railway company, duly and legally called and convened the said board being fully authorized by law so to do, did resolve in substance and effect, for the purpose of providing means to satisfy and discharge the liens aforesaid, and refund the said indebtedness, and to borrow money for the objects of the organization of the said company, that the railway company, under its corporate seal, make and issue, from time to time, its certain other bonds and obligations, to the extent of ten millions of dollars,—$10,000,000,—and thereby become indebted to divers persons, bodies politic or corporate who shall become holders thereof, the said bonds to be ten thousand in number, numbered consec-tively from one to ten thousand inclusive, each of them to be for the sum of one thousand dollars—$1,000—

and to bear date on the first day of January, 1886, and to be
96 payable on the first day of April, 1916, in gold coin of the United States, of the present standard weight and fineness, with interest thereon to be payable on the first days of April and October in each year, on presentation of the coupons to be attached thereto, and to be in the form and contain the provisions following, that is to say:

UNITED STATES OF AMERICA, *State of Indiana.*

Louisville, New Albany and Chicago Railway Company.

$1,000. $1,000.

Consolidated Mortgage Bond.

For value received, the Louisville, New Albany and Chicago Railway Company hereby promises to pay to the Farmers' Loan and Trust Company and John H. Barker, trustees, or bearer, at the com-

pany's office, in the city of New York, on the first day of April, which will be in the year one thousand nine hundred and sixteen, one thousand dollars, in United States gold coin of the present standard weight and fineness with interest payable in like gold coin at the rate of six per centum per annum, semi-annually, free of United States Government tax, on the first days of April and October, in each year until the principal is paid on the presentation and surrender of the respective coupon hereto annexed, the principal and interest of this bond being payable without relief from valuation or appraisement laws. This bond is one of a series of ten thousand bonds, of like form and tenor, the payment of which is secured by a mortgage, or deed of trust, to the Farmers' Loan and Trust Company and John H. Barker, as trustees, bearing even date, herewith and duly reported, to which mortgage, or deed of trust, and the provisions and conditions thereof, reference is hereby made,

This bond shall not become obligatory until the certificate
97 hereon endorsed shall be signed by the Farmers' Loan and
Trust Company, trustees. This bond may be registered at the office of the party of the first part, or at its agency in the city of New York at the option of the holder, and thereafter, unless at any time registered payable to bearer, will only be payable to such person as on this bond shall appear, from time to time, to be the last duly registered transferee or owner thereof.

In witness whereof, the Louisville, New Albany and Chicago Railway Company has caused this bond to be signed by its president and secretary and its corporate seal to be hereto affixed, this first day of January one thousand eight hundred and eighty six.

——— ———, *President.*
——— ———, *Secretary.*

And whereas, at the meeting and for the purposes aforesaid, the said board of directors did further resolve that for the purpose of equally securing all of the said bonds the railway company, under its corporate seal, should make and deliver to the trustees a mortgage, or deed of trust, conveying, assigning and transferring to the trustees in trust, all its railroad and franchises, as hereinafter described as security for the payment of said bonds, and each and all of them, and the interest to accrue thereon, upon the terms and conditions hereinafter contained, which were and are, by the said board of directors, deemed to be just and equitable.

Now, therefore, this indenture witnesseth, that the Louisville, New Albany and Chicago Railway Company, party of the first part, in consideration of the premises and of one dollar to it in hand paid,

at or before the ensealing and delivery of these presents, the
98 receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, assign, set over, release, convey, and confirm unto the Farmers' Loan and Trust Company and John H. Barker, parties hereto of the second part;

and to the survivor of them, and to their successor or successors in the trust herein and hereby created and declared, all the railway of the party of the first part, in the city of Louisville, in the State of Kentucky, and extending from New Albany on the Ohio river, to Michigan City in the State of Indiana, and from the city of Chicago, in the State of Illinois, to the Indiana State line, under a leasehold right, and from said State line to the city of Indianapolis, in the State of Indiana, including the railway lying and being in all of said cities, and terminal rights and facilities and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, La Porte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton, and Lake, in said State of Indiana, and Jefferson county in said State of Kentucky, and Cook county in said State of Illinois, and also all branches thereof, including all the property of every sort or nature now owned by said railway company, and all that it may in the future acquire for the purposes and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges, and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured
99 materials, coal, wood, and supplies of every kind, belonging or appertaining to the railway company, also all the tolls, incomes, issues, and profits, arising out of the said property and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part, in and to any and all real estate belonging to the said party of the first part, also all leasehold lands, with the buildings thereon erected; it being the true intent and meaning of these presents, that the said railway company shall and doth convey to the said trustee, all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company or which may at any time hereafter during the continuance of this trust, be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described; and also all choses in action of every kind and description including bills receivable, book accounts, traffic balances, all books of record, and all accounts of every kind and description, all papers, maps, inventories, and documents, in anywise referring or relating to the property or franchises hereby conveyed; and also all franchises and property, and all personal rights or interest in any franchises or property, of every kind or description, real, personal or mixed, and wherever the same may be situate that may at any time, before or

after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways; all of which it is hereby covenanted
100 shall inure by way of accretion to the benefit and advantage of said trustee, and by way of further and better security, this conveyance being made subject to the liens of certain mortgages heretofore made by the party hereto of the first part, namely: a mortgage dated July first, 1880, made to John C. New and Washington C. De Pauw as trustees, covering a portion of the above described premises; a certain other mortgage, dated August 10th, 1881, made to John C. New trustee, covering another portion of the above-described premises; and also a mortgage made by the party of the first part hereto to the parties of the second part hereto, as trustees, dated February first, 1883,

To have and to hold, all and singular, the above described premises to the trustees, their and each of their successors or successor in the trust hereby created, to the only proper use and behoof of the said trustees, their and each of their successors or successor, in trust nevertheless for the uses and purposes hereinafter expressed, namely:

First. To secure the payment of the bonds of the said railway company to be issued as herein recited, and for the use and benefit of the person or persons, firm or firms, bodies politic or corporate, who shall at any time become the purchasers or holders, owners or bearers, of either or any of the said bonds, subject to the terms, provisions and stipulations in the said bonds contained, which bonds, however, shall be equal in priority of lien, at whatever time the same may respectively have been issued.

Second. Until default shall be made in payment of the principal or interest secured by said bonds, or some of them the railway company shall be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises, with their appurte-
101 nances, and to take and use the rents, incomes, profits, and issues thereof, in the same manner and to the same effect as if this indenture had not been made.

Third. In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall continue for the space of six months, and such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured hereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same, and upon demand in writing being made by the trustees, the railway company shall immediately surrender possession of all and singular the mortgaged premises and property, of every sort and description, to the trustees. It shall also be lawful for the trustees, in case such default shall be made and continue as aforesaid, and payment be demanded and in case such request of bondholders be made as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description, hereby con-

veyed at public auction, in the city of New York or in Chicago, Illinois, as the trustees may elect—such election, however, being subject to a right on the part of a majority of the bondholders to designate at which of the two said places the sale shall be made,—having first given notice of the time and place of such sale by advertisement published not less than once a week, for three months next preceding the time specified for the sale, in one or more newspapers published in the city of New York, and in one or more newspapers published in the city of Chicago, Illinois, and to adjourn the said sale from time to time, by announcement at the time and place advertised, without further advertisement, and to make
102 and deliver to the purchaser or purchasers, good and sufficient deed or deeds in fee simple, which sale being made to the highest bidder, shall be a perpetual bar, both at law and in equity, against the railway company and all other persons lawfully claiming the above described premises and property or any part thereof, or any lien upon or interest in the same, through or from the said railway company, and after deducting from the proceeds of such sale a just allowance for all expenses thereof, including reasonable attorney and counsel fees, and any other necessary expenses incurred by the trustees in executing their trust, including their own reasonable compensation, to apply the proceeds to the payment of the principal of such of the aforesaid bonds as may be at the time outstanding and unpaid, whether the same shall or shall not have previously become due, and of the interest which shall at that time have accrued on said principal and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal and such accrued and unpaid interest; and if after satisfaction thereof, a surplus shall remain to pay the same over to the railway company.

Fourth. In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall continue for the space of six months, and such payment shall be duly demanded, then the trustees, if they shall elect to do so, may, and if requested in writing by the holders of one-half of the bonds secured hereby, and then outstanding, shall apply to any court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage and sale, of the mortgaged premises and property, and for the appointment in the meantime of a re-
103 ceiver of the mortgaged premises under this indenture, the trustees, to have the right to nominate and designate the person to be appointed receiver, and so far as lawfully may be done, to control and direct, the general course of the administration of the mortgaged premises by and on the part of such receiver. In the event of such right of foreclosure and sale accruing for non-payment of interest, immediately thereupon the whole amount of the principal of the bonds secured by this indenture and then outstanding, shall, at the option of the trustees, become due and payable, and this provision is expressly declared not to be in the nature

of a penalty for a breach of condition or for the non-payment of interest, but to be a provision which is essentially necessary to carry out the objects and purposes of the parties hereto.

Fifth. If the trustees shall enter upon the mortgaged premises and take possession, control and management thereof, under any preceding provision, they shall apply and administer the net revenue and income arising from the mortgaged premises during such possession, in the discharge and satisfaction of interest, or interest and principal, secured by this indenture, as the same may become due and payable and in due order of priority; during such possession, occupation, control and management, the trustees shall only be liable for the exercise of good faith and of reasonable diligence and all expense, loss and damage of every kind and nature growing out of such possession, control and management, shall, to the extent that any liability is incurred thereby, constitute a charge upon the mortgaged premises exclusively. The trustees, during such possession shall have the right and power to manage the property and premises, and may enter into any and all contracts proper, ordinary and usual in such cases whether by lease or otherwise, and may charge the same as a lien upon the mortgaged premises or any part thereof, and generally may do and perform such things in the premises as the railway company itself might do and perform had it remained in undisputed possession and control of the premises.

104

Sixth. If a receiver of the mortgaged premises shall be appointed under the provisions of this indenture, all the expenses incident to such appointment, including all his lawful obligations and expenses, shall constitute a lien upon the mortgaged premises superior to the lien of any of the bonds secured by this indenture. Such receiver shall have the power to enter into contracts and obligations, and to do all other things incident to the management of the property and which the railway company would have had power to do had it remained in possession of the mortgaged franchises premises and property. The right of action under this indenture is vested exclusively in the trustees, and under no circumstances shall any bondholder or any number of bondholders have any right to institute an action or other proceedings on or under this indenture for the purpose of enforcing any remedy herein and hereby provided; and all actions and proceedings for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustees, according to their sound discretion until the owners and holders of a majority of the bonds secured hereby and then outstanding shall unite in requesting in writing the trustees to do or refrain from doing some particular act or acts, or to pursue or to refrain from pursuing any particular line of conduct or policy connected with the enforcement of such security, accompanying such request with evidence to the satisfaction of the trustees that they are such actual owners of bonds, and also with satisfactory in-

demnity to the trustees for all expenses and costs of every
105 kind, and also for all possible claims for damages.

Seventh. In case of any sale of the premises embraced in this mortgage under a decree of any court having jurisdiction thereof, based on the foreclosure of this mortgage, or in pursuance of advertisement without such decree as aforesaid, the trustees may, in their discretion, purchase, and they are hereby fully authorized and empowered to purchase the premises, property and franchises embraced herein, for the use and benefit of the holders of the then outstanding bonds secured by this mortgage, and having so purchased the said premises, property and franchises, the right and title thereto shall vest in the trustees, and no bondholder shall have any claim thereto or to the proceeds thereof, except for his *pro rata* share of the proceeds of such purchased premises, property and franchises, as represented in a new company or corporation to be formed for the use and benefit of the holders of the bonds secured hereby and then outstanding; and the trustees may take such lawful measures as they may deem for the interest of the bondholders to organize or procure the organization of a new company or corporation for the benefit of the holders of the bonds secured by this indenture and then outstanding. The said new company or corporation shall be organized upon such terms, conditions and limitations, and in such manner as the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request or direct; and provision *made*, if such majority shall so elect, but not otherwise, be made in the organization of such new company or corporation for the interests of any or all the holders of the junior obligations of the railway company, and for its stockholders and simple contract creditors, or any of them, and the trustees so purchasing shall
106 thereupon convey the premises, property and franchises, so purchased by them, to such new company or corporation.

Eighth. In case it shall become necessary to institute proceedings for the foreclosure and sale of the mortgaged premises, or should any such sale take place under the power above set forth, the trustees shall aid, promote, and encourage in all lawful ways any plan for the reorganization of the mortgaged premises and property, suggested for the benefit and advantage of the holders of bonds secured hereby, that they may deem most beneficial for such bondholders, and in case of any such sale the same shall be conducted under the general control and management of the trustees, and the trustees shall receive and distribute the proceeds of sale, except as otherwise provided in and by the plan of reorganization in pursuance of which such sale may be had it being understood and agreed that the trustees shall be guided and controlled in all such proceedings by the terms and provisions of any scheme of reorganization which shall receive the assent of the holders of a majority of the bonds secured by this indenture, and then outstanding, and shall be approved by the trustees,

Ninth. The railway company reserves and retains for itself, its

successors and assigns, the right to sell, lease, and otherwise dispose of, free from the lien of this mortgage and deed of trust, any real or personal property now covered or affected, or hereafter to be covered or affected by this mortgage, which may no longer be required by the railway company for the purposes of its incorporation; provided, however, that the proceeds of such sale, lease, or disposition shall be received by the trustees and be applied by them to the purchase of other property in the name of the railway company,
107 to be subject to the lien hereof or be applied to the purchase of bonds secured hereby, which said bond- shall be canceled.
108 Any conveyance by the railway company of any such real or personal property, in which the trustees shall join, shall convey the same free and discharged of any lien hereby created, if a recital to such effect shall be contained in such conveyance, but not otherwise; and in case of such recital, this indenture shall, as to the property so conveyed, be thereafter void and of no effect; and no obligation shall be imposed on the purchaser to see to the application of the purchase money.

Tenth. No holder of any bond hereby secured shall have recourse for payment to any stockholder of the railway company, or to any person who has ever been such stockholder, or make any demand for the payment of any such bond against any such person under and in pursuance of any law imposing liability upon any stockholders of incorporated companies whether such law be now in force or shall hereafter be enacted, or by reason of any cause whatever; and the railway company hereby expressly waives the benefit of ant appraisal, stay or exemption law that may now or at any time be in force, and consents that any sale that may be had under the provisions of this mortgage shall be had in the same manner and to the same effect, as if such appraisal, stay, or exemption law did not exist.

Eleventh. If the railway company shall well and truly pay the sums of money by the said bonds secured hereby, and the coupons thereto attached, required to be paid by it, which it hereby covenants to do, and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby entered into and required to be kept and performed, according to the true intent and meaning of these presents, then, and in that case, the estate, right, title and interest of the trustees in the above described mortgaged property and premises shall cease, determine and
109 become wholly void.

Twelfth. The trustees shall be under no obligation to recognize any person or persons firm or corporation, as holder or holders, owner or owners, of one or more of the bonds secured hereby, or to do, or refrain from doing, any act pursuant to the request or demand of any person or persons, firm or corporation, pro-

fessing or claiming to be such holder or holders, until such supposed holder or holders shall produce the said bonds and deposit the same with the Farmers' Loan and Trust Company, and shall also indemnify and save harmless the trustees, to their full satisfaction, from any and all costs, expenses, outlays, and counsel fees, and any other reasonable disbursements for which they may become liable or responsible on proceeding to carry out such request or demand, and for their reasonable and proper compensation in that behalf. Should any suit or other proceeding be brought in any court against the trustees, as trustees under this indenture, or by reason of any matter or thing connected with the trusts hereby created, or the premises affected hereby, the trustees shall thereupon notify the railway company, of the fact by delivering such notice at the office of the railway company; and the trustees shall thereupon be under no obligation to enter an appearance by counsel, or in any way to appear in and defend the said suit or other proceedings until indemnified to their satisfaction for so doing; but they may appear in and defend the same without indemnity if they shall elect so to do, and be compensated therefor from the trust fund. In any case at any time it shall be necessary and proper for the trustees to make any investigation respecting any fact or facts preparatory to taking or not taking any action, or doing or not doing anything as such trustees, the certificate of the president of the railway company, under the corporate seal, attested by the affidavit of one or more directors of the said corporation, shall be sufficient evidence of such fact or facts to protect the trustees in any action they may take or anything they may do or refrain from doing, by reason of the supposed existence of such facts.

The trustees shall only be responsible for reasonable diligence in the management of the trust, and shall not be answerable in any case for the act or default of any agent attorney or employee selected with reasonable discretion. The trustees shall be entitled to be reimbursed all proper outlays of every sort and nature by them incurred in the discharge of this trust, and to receive a reasonable and proper compensation for any duty they may at any time perform in the discharge of the same, and all such fees, commissions, compensations, and disbursements shall constitute a lien on the mortgaged property and premises.

Thirteenth. In case the office of trustee under this indenture shall become vacant by reason of incapacity, the removal or resignation of the said parties of the second part, or either of them, or any successor, it shall be lawful for the holders of a majority in amount of the bonds hereby secured, and then outstanding, to appoint a successor or successors, by a writing by them signed, and upon such appointment being made, and said trust being accepted and written notice thereof to said railway company, any such successor or successors, substituted trustee or trustees, shall without further act or

deed become vested with all and singular the state, right and power and shall perform all the duties of trustee in like manner and with the same effect as if it, they, or he had been named in this instrument, as trustee or trustees.

111 Fourteenth. The word "trustee," "trustees," or 'successors" wherever used in this instrument, shall mean the trustees under this mortgage for the time being whether original or substituted, with all the powers appertaining to his or their office.

It is further covenanted and agreed between the parties hereto that eight thousand three hundred of the bonds to be issued under and secured by the lien of this mortgage representing eight million three hundred thousand dollars—$8,300,000—of principal, shall be executed and delivered to the Farmers' Loan and Trust Company as trustees, to be certified and used by the said trustees as follows, that is to say,

Three thousand thereof to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage for three million dollars,—$3,000,000—upon the main line, dated July first, 1880;

Twenty three hundred thereof to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage on the Air-Line, dated August first, 1881;

One thousand thereof to be exchanged for bonds, representing equal amounts of principal secured by and under the above mentioned mortgage on the whole road for one million dollars,—$1,000,000,—dated February first, 1883.

Two thousand thereof to be exchanged for bonds representing equal amounts of principal secured by and under the above mentioned mortgage for three million dollars—$3,000,000,—dated March 24th., 1884.

Such exchanges shall be made and conducted under the terms and subject to such conditions as may be agreed upon between the railway company and Farmers' Loan and Trust Company, and may be made from time to time before or after the maturity of the bonds secured by the said prior mortgages or any of them.

112 The one thousand bonds issued under the three million dollars—$3,000,000,—mortgage of March 24th., 1884 heretofore delivered to the said trust company, to be exchanged for a like amount of bonds under the one million dollar,—$1,000,000—, mortgage of February first, 1883, shall be canceled by the said trust company whenever all of the said eight thousand three hundred bonds under this mortgage have been delivered to said trust company, and all of the remaining two thousand bonds under the said mortgage of March 24th, 1884, have come into the hands of the said trust company by exchange as above provided.

Each of the bonds under any of the said prior mortgages so acquired by exchange, shall be received by the said Farmers' Loan

and Trust Company and shall thereupon be stamped upon the face thereof as payable only to the parties of the second part as trustees, and shall thenceforth be payable only to the said parties of the second part, as trustees, and shall be held by them as collateral security for the payment of all the bonds issued or to be issued under this mortgage, until all the bonds authorized under such prior mortgage, shall have come into the possession of the said Farmers' Loan and Trust Company.

Whenever all of the bonds authorized under any one of the prior mortgages aforesaid shall have come into the possession of the said Farmers' Loan and Trust Company as trustees, as aforesaid, the same shall be canceled, and the mortgage securing the same shall de discharged of record.

The payment of the interest upon all the bonds issued and outstanding under this mortgage shall be deemed a satisfaction of all the interest accrued at the time of such payments upon the bonds so held by the said trustees, and no interest shall be payable
113 upon the bonds so held until after a default in the payment of interest on the bonds secured by this mortgage.

And it is further covenanted and agreed by the railway company, that it will well and truly pay the sums of money in the said bonds, and in each and all of them mentioned, together with the semi-annual interest due and to become due thereon, at the times, and in the manner and at the places specified therein; and further that it will well and truly pay, or cause to be paid, all taxes, charges, rates, levies and assessments imposed, assessed or levied, or which may hereafter be imposed, assessed or levied upon the premises and property hereby mortgaged, conveyed and assigned, or intended so to be, or any part thereof, and shall and will, at its own proper cost, expense and charge, do, or cause to be done all acts and things necessary and proper to be done, or performed, in order to preserve and keep valid and intact this lien or incumbrance upon all and singular the property and premises above described.

And it is further covenanted and agreed by the railway company to and with the trustees, that it will from time to time, and at all times upon reasonable request, make, execute, acknowledge and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assuring unto the trustees, upon the trusts and for the purposes herein expressee or intended, all and singular the property of every sort and description hereby mortgaged or conveyed in trust, or appearing, purporting or intended to be, now owned or possessed by or vested in the railway company or *they* may hereafter be owned, possessed, acquired or vested in the railway company, as by the trustees or their counsel learned in law shall be reasonably devised, advised or required.

In testimony whereof, the corporations, parties, hereto have
114 caused their respective corporate seals to be hereto affixed and the same to be duly attested, and the said John H. Bar-

ker hath hereunto set his hand and seal the day and year first above written.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
By WM. DOWD, *President.*

[Seal of Louisville, New Albany and Chicago Railway Company, Indiana.]

Attest: WM. DULLES, JR.,
Assistant Secretary.

THE FARMERS' LOAN AND TRUST COMPANY,
By R. C. RALSTON, *President.*

[Seal of Farmers' Loan and Trust Company, New York.]

Attest:
WM. H. LEUPP, *Secr'y.*
JOHN H. BARKER. [SEAL.]

115 STATE OF NEW YORK, }
City and County of New York, } *ss.:*

Be it remembered, that on this eighth day of January A. D. 1886, before me, a commissioner of deeds for the States of Indiana, Kentucky, and Illinois, residing in said State, city and county, aforesaid, personally appeared William Dowd, president of the Louisville, New Albany and Chicago Railroad Company, personally known to me to be the president of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said railway company, and by authority of its board of directors, had signed and delivered the said instrument as the free and voluntary act, of the said railway company, for the uses and purposes therein set forth; also personally appeared before me at the same time William Dulles, Jr., assistant secretary of the said railway company, personally known to me to be such assistant secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said railway company, and by like authority had signed the said instrument and affixed thereto the official corporate seal of said railway company, as the free and voluntary act of the said Louisville, New Albany and Chicago Railway Company for the uses and purposes therein set forth, that he knew the corporate seal of said company, and that the seal so affixed, is said corporate seal.

And also at the same time before me, personally came Rosewell G. Ralston, president of the Farmers' Loan and Trust Company, personally known to me to be the president of said company, and personally known to me to be the real person whose name is
116 subscribed to the foregoing instrument, and acknowledged that he, in behalf of said trust company and by authority of its board of directors had signed and delivered the said instrument as

the free and voluntary act of the said trust company, for the uses and purposes therein set forth; and also personally appeared before me at the same time William H. Leupp, secretary of the said trust company, personally known to me to be the secretary of said company, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said trust company, and by like authority had signed the said instrument and affixed thereto the official seal of said trust company as the free and voluntary act of the said Farmers' Loan and Trust Company for the uses and purposes therein set forth; that he knew the corporate seal of said company and that the seal so affixed is said corporate seal.

And I further certify that this instrument of writing from the Louisville, New Albany and Chicago Railroad Company to the Farmers' Loand and Trust Company, and John H. Barker, trustees, was at the time and place first above mentioned, produced to me by the president and secretary of the said railway company, and acknowledged as aforesaid.

In witness whereof, I have hereunto set my hand and affixed my official seal this 8th., day of January, 1886.

CHARLES NETTLETON,
Commissioner for the State of Indiana in New York.

[Seal of Charles Nettleton, Commissioner for Indiana in New York.]

CHARLES NETTLETON,
Commissioner for the State of Kentucky in New York.

[Seal of Charles Nettleton, Commissioner for Kentucky in New York.]

117

CHARLES NETTLETON,
Commissioner for the State of Illinois in New York.

[Seal of Charles Nettleton, Commissioner for Illinois in New York.]

STATE OF INDIANA, }
County of La Porte, } *ss:*

Be it remembered that on the 11th., day of January A. D. 1886, before me Jared H. Orr, a notary public duly commissioned and qualified, personally appeared John H. Barker, to me personally known to be the real individual described in, and who executed the foregoing instrument, and acknowledged that he had executed the same as his voluntary act and deed.

Witness my hand and official seal at Michigan City, Ind., this 11th., day of January, A. D., 1886.

JARED H. ORR,
Notary Public.

[Seal of Jared H. Orr, Notary Public, La Porte, Indiana.]

STATE OF INDIANA, } ss:
County of White, }

The foregoing instrument was filed for record in the recorder's office of White county on the 13th., day of January, A. D., 1886, at 10 o'clock in the forenoon of that day and duly recorded in Book 25, on page 194 *et seq.*

JAMES P. SIMONS,
Recorder of White County.

118 Plaintiff offered in evidence the original of the mortgage made by the Louisville, New Albany & Chicago Railway Company to the Central Trust Company of New York dated May 1st, 1890, and the certificate of its recording in Pulaski county, dated May 21st, 1890 at 2 o'clock in the afternoon, in Book U, of Mortgages, at page 41.

Defendants objected to the introduction of this mortgage in evidence on the ground that there is nothing described in the mortgage except the property then occupied and used by the railway company for railroad purposes, and such other property as it might thereafter acquire for railroad purposes, and does not describe this property; and defendants objected further on the ground that the owner of these lands was no party to this mortgage. The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted. And the said mortgage (identified by the reporter as Exhibit E:), being then read and given in evidence, was in the words and figures following, to-wit:

EXHIBIT E.

This indenture, made and entered into this first day of May, one thousand eight hundred and ninety by and between the Louisville, New Albany and Chicago Railway Company, hereinafter called the railway company, a corporation duly created and existing under the laws of the State of Indiana, party of the first part, and the Central Trust Company of New York a corporation duly created and existing under the laws of the State of New York, hereafter called the trust company, and John H. Stotsenburg of New Albany, in the State of Indiana, parties of the second part;

Whereas, the party of the first part owns and is operating
119 a system of railroads in the State of Indiana, about 512 miles in length which is composed of a line from New Albany on the Ohio river to Michigan City on Lake Michigan, hereinafter called the main line; and a line from Indianapolis to a junction with the Chicago and Western Indiana railroad at a point on the State line between Indiana and Illinois about twenty miles southeast of Chicago, hereinafter called the air-line, together with certain

proprietary and leasehold interests in the franchises and railroad of the said Chicago and Western Indiana Railroad Company, and the Belt Railway Company of Chicago, and in the terminal facilities of the said companies in and near the city of Chicago, Illinois; and all its real estate, buildings, tracks, trackage and terminal rights, facilities and approaches in the other cities above mentioned and in the city of Louisville, in the State of Kentucky, and between said city of Louisville and the city of New Albany and in the city of Indianapolis, Indiana; and is also the exclusive owner of the Bedford and Bloomfield, and the Orleans, West Baden and French Lick Springs railroads.

Whereas, the said system of railroads is subject to the following present liens, that is to say:

First. The main line from New Albany to Michigan City is subject to the lien of a mortgage, made July 1st, 1880, by the party of the first part to John C. New, of Indianapolis, and Washington C. De Pauw of New Albany, in the State of Indiana, as trustees, to secure three million dollars ($3,000,000) of bonds, bearing date July 1st, 1880, and payable July 1st, 1910, with interest at the rate of six per cent. per annum, hereafter called main line bonds.

Second. The air-line from Indianapolis to the State line of Illinois is subject to the lien of a mortgage made August 10th, 1881, by the party of the first part to John C. New, of Indianapo-
120 lis, as trustee, to secure two millions three hundred thousand dollars ($2,300,000) of bonds, bearing date August 10th, 1881, and payable August 1st, 1911, with interest at the rate of six per cent. per annum, hereafter called air-line bonds.

Third. The whole system of railroad is subject to the lien of a mortgage made January 1st, 1886, by the party of the first part to the Farmers' Loan and Trust Company of New York, and John H. Barker, of Michigan City, as trustees, to secure now outstanding bonds amounting to four million seven hundred thousand dollars ($4,700,000), bearing date January 1st 1886, and payable April 1st 1916, with interest at the rate of six per cent. per annum, hereafter called consolidated bonds.

Fourth. The whole of the said mortgage liens amount in the aggregate to ten million dollars ($10,000,000).

Whereas, at a meeting of the stockholders of the said railway company, party of the first part, duly and legally called and held on March 22, A. D. 1890 a preamble and resolutions were adopted by the affirmative votes of 32641 shares of stock, being more than a majority of all the shares of stock in the said company, which read as follows:

121 Whereas, it is very desirable for this company to fund its present bonded obligations into a single security bearing a lower rate of interest than those now outstanding and also to improve the condition of its railway, increase its equipment, buildings and facilities and also to construct and acquire from time to time as author-

ized by law, other extensions and railroads, so as to increase and develope the traffic of the system.

Therefore, resolved, that for the purpose of paying, funding, exchanging and retiring the mortgage bonds of this company now outstanding, and for constructing and acquiring extensions and additional lines of railroad and for increasing the equipments, shops, buildings, sidings, appurtenances and facilities and improving the condition of this company's railroad, the board of directors, and president and secretary of the Louisville, New Albany & Chicago Railway Company, be and they are hereby authorized and directed to issue the corporate coupon bonds of the said company to be designated general mortgage gold bonds, bearing interest at the rate of 5 per cent. per annum, and payable in fifty (50) years from May 1, 1890, to the amount of twenty-five thousand dollars (25,000) per mile of main track of the present system of its railway, that is to say, five hundred and twelve (512) miles of which ten million dollars ($10,000,000) shall be reserved and used exclusively for the purpose of paying off, purchasing, funding, exchanging and retiring the present outstanding bonds of this company to a like amount which are secured by the different mortgages or deeds of trust upon some portion or all of its said railway; and also from time to time issue such other bonds of the same class to the amount, and at the rate of twenty five thousand dollars ($25,000) par value for each and every mile of main track of additional railroad
122 actually owned by this company either in the State of Indiana, or elsewhere, whether acquired by construction, purchase, consolidation or otherwise; and for the purpose of securing the payment of said bonds, the president and secretary are authorized and directed to execute in the corporate name of this company, and on its behalf and under its corporate seal and to acknowledge and deliver unto such trustees as the board of directors shall select and appoint, a mortgage or deed of trust, bearing date, May 1, 1890, conveying by way of mortgage all the railroad of this company now constructed and in operation, including all its branches, sidings and leasehold rights and also all railroads, extensions and branches which may be hereafter created, built, purchased or acquired by this company, whether by construction, purchase, consolidation or otherwise and whether situate within or without the State of Indiana, together with all the equipment and appurtenances at any time belonging to this company, or in use on its lines of railway wherever situate, (and all and singular its property of every kind and nature, real, personal and mixed, now owned or at any time to be hereafter acquired, in possession or expectancy, including the corporate and other franchises of the company).

Resolved further, That the board of directors of this company may adopt such form of bonds and mortgages or deed of trust as they may think proper to carry into execution the general resolve and authority aforesaid. And,

Whereas, at a meeting of the board of directors of said railway

company, party of the first part, duly and legally called and held on March 22, A. D. 1890, the said board in pursuance of the vote and directions of the said stockholders' meeting did adopt the following resolves which are at large spread upon the records of such meeting, viz.;

123 "Be it therefore resolved,

"In execution of the authority and direction of the above and foregoing action of the stockholders of this corporation, the board of directors do hereby empower and instruct the president and secretary of this corporation,

"First. To prepare, sign, seal and execute an issue of its coupon bonds of the general form and tenor following, subject only to the necessary variations as to amount and serial numbers, each of said bonds being for the sum of one thousand dollars, or five hundred dollars, as the board may determine, viz.;

UNITED STATES OF AMERICA, *State of Indiana.*

No. —. $1,000.

General Mortgage Gold Bond.

The Louisville, New Albany and Chicago Railway Company, a corporation of the State of Indiana, for value received hereby agrees to pay to the Central Trust Company of New York, or the bearer hereof, the sum of one thousand dollars, in gold coin of the United States of the present standard of weight and fineness, at the office or agency of said railway company, in the city of New York, on the first day of May, in the year one thousand nine hundred and forty, with interest thereon in the meantime at the rate of five per cent. per annum, payable semi-annually in like gold coin, on the first days of May and November, in each year, at the said New York office or agency, upon presentation of the coupons hereto annexed as they severally become due. The principal and interest on this bond is payable without relief from valuation or appraisement laws. In case of default in the payment of any coupons for a period of six months after presentation and demand, the principle of this
124 bond may be declared to be due in the manner and with the effect and subject to the conditions contained in the mortgage or deed of trust which secures the payment hereof, as hereinafter mentioned.

This bond may be registered at the general office of the said railway company, or at its New York agency, at the option of the holder and thereafter, unless at any time registered as payable to bearer, will only be payable to such person as on this bond shall be designated from time to time as the last duly registered transferee or owner thereof.

This bond is one of a series of coupon bonds of like tenor and effect, and numbered consecutively from one upward and are issuable by the said railway company under and in accordance with

the terms and conditions of the mortgage or deed of trust hereinafter mentioned, for the purpose of retiring, funding and redeeming the existing bonded indebtedness of the said railway company, improving and equipping its railroad and acquiring by construction or otherwise, extensions and branches thereof, whether in the State of Indiana or elsewhere. The total amount of bonds of this series authorized to be issued by said railway company is expressly limited by said mortgage or deed of trust as follows:

First. A present issue of twelve million, eight hundred thousand dollars, being at the rate of $25,000 per mile of main track of the present system of owned railroad of 512 miles, of which amount ten million dollars of bonds, numbered from 1 to 10,000, both inclusive, shall be reserved and used exclusively for the purpose of purchasing, exchanging or retiring the present outstanding mortgage bonds of said railway company to a like amount, in the manner recited in the mortgage or deed of trust.

Second. Such additional issue from time to time as prescribed in said mortgage or deed of trust as will amount to twenty-five
125 thousand dollars par value for every mile of main track of additional railroad, extension or branch line, either constructed or acquired and owned by said railway company, whether by purchase, consolidation or otherwise and situate in the State of Indiana or elsewhere.

The payment of each and all of the bonds of this series, together with interest thereon, without reference to the time when any of such bonds shall be actually issued or certified is secured by a mortgage or deed of trust of even date herewith, duly executed and delivered by the said railway company to the Central Trust Company of New York, and John H. Stostenburg of Indiana, as trustees, convey all and singular the railway, equipment, appurtenances, property, leasehold rights, terminal facilities, assets and franchises of the said railway company which it now owns and all railroads, extensions, branches, equipment, property and appurtenances which it may at any time hereafter own or possess, together with all privileges and franchises thereto appertaining as in said mortgage or deed of trust is more particularly specified and described.

This bond shall not be valid, or entitled to any benefit of such mortgages security until it has been duly certified by the trustees as provided in the said mortgage or deed of trust.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary, and has caused each of the said coupons to be attested by the engraved signature of its secretary on this first day of May A. D. one thousand eight hundred and ninety.

126 LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY,

By —— ——, *President.*

[SEAL.]

Attest: ——, *Secretary.*

The coupons to be attached to such bonds shall be in the following form, and each shall have the signature of the secretary engraved thereon;

$25.

The Louisville, New Albany and Chicago Railway Company on November 1st, A. D. 1890, will pay to bearer twenty-five dollars, at its office or agency in New York, being six months' interest on its general mortgage gold bonds No. —.

—— ——, *Secretary.*

Each of such bonds shall bear thereon a certificate to be duly signed by the said Central Trust Company of New York trustee, in the following form:

Trustee's Certificate.

This is one of a series of bonds numbered from one upward, issued by the Louisville, New Albany and Chicago Railway Company, referred to in the mortgage or deed of trust in said bond described; and this bond has been issued in accordance with the provisions of said mortgage or deed of trust.

THE CENTRAL TRUST COMPANY
OF NEW YORK, *Trustees,*
By —— ——, *Vice President.*

127 Second. The president and secretary of this company are hereby further empowered and instructed to prepare, in paper form, a mortgage or deed of trust whereby, for the security and payment of the aforesaid issue of bonds and interest, this corporation shall convey and mortgage unto the Central Trust Company of New York and John H. Stotsenburg, of Indiana, as trustees, all and singular, the railroads, property, assets, equipment, appurtenances, leasehold rights, terminal facilities and franchises of this company at present owned, and all railroads, extensions, branches, property, equipment, appurtenances, leasehold rights, terminal facilities and franchises which it may hereafter own, either within or without the State of Indiana, and thereupon to sign, seal with the corporate seal, acknowledge and deliver said mortgage or deed of trust unto said trustees as the act and deed of this corporation, for the uses and purposes therein expressed.

Now, therefore, this indenture witnesseth: That the said Louisville, New Albany and Chicago Railway Company party of the first part, in consideration of the premises and of one dollar, to it in hand paid at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, set over, released, conveyed and confirmed and by these presents doth grant, bargain, sell, assign, set over, release, convey and confirm unto the Central Trust

Company of New York, and John H. Stotsenburg, of the State of Indiana, parties of the second part, and to the survivor of them, and to their successors or successors in the trust herein and hereby created and declared, all the present and in future to be acquired railway system and property of the said party of the first part of every kind and nature and however owned, held, leased or enjoyed, together with all the equipment, appur-
128 tenances and franchises now owned or at any time hereafter to be acquired by it, being more particularly described as follows: All the present line of railway, extending from New Albany, Indiana, to Michigan City in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield rail road, extending from Bedford to Switz City, Indiana, and also its other proprietary and owned line of railroad called the Orleans, West Baden and French Lick Springs railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal facilities in the city of Louisville, Kentucky, and *and* also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois; and also its real estate, trackage, leasehold, contract rights, and terminal properties, stations, sidings, and franchises in the city of Indianapolis, Indiana, and also all its leas-holds and contract rights, trackage and terminal facilities vested in the party of the first part, by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the city of New Albany, Indiana, and the city of Louisville, Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and
129 operated by it, being about five hundred and twelve miles in length, and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton, and Lake, in the State of Indiana, and Cook county, in the State of Illinois, and Jefferson county, in the State of Kentucky; and also all other railroads, extensions and branch lines which the railway company, party of the first part, may at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the State of Indiana, or in any other State, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company and all that it may in the future add, construct, or ac-

quire, for the purpose of and connected with or appertaining to the railroads or railways above mentioned and described whether now owned or hereafter to be constructed or acquired together with all the lands, tracks, lines, rails, bridges, ways buildings, shops, tanks, piers, wharves, structures, erections turn-tables, fences, walls, fixtures, franchises, privileges and right of the railway company, and also all locomotives engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal wood, supplies of every kind belonging or appertaining to the railway company; also all the tools, incomes, issues and profits, arising out of the said party and its operation, and all rights to receive and recover the same, also all the estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected; it being the true intent and meaning of these pres-
130 ents *and* that the said railway company, party of the first part, shall and doth convey to the said trustees, all and all manner of franchises, of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property of whatever nature or description the same may be, at the date of these presents, owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company, for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents, in anywise referring or relating to the property or franchise hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description real, personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall inure, by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind
131 all railroads, real and personal property, chosen in action, contract rights and franchises which the said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and

owned by the said railway company, and were specifically described herein and conveyed hereby.

To have and to hold, all and singular, the above described premises to the trustees, their and each of their successor or successors in the trust hereby created, to the only proper use and behoof of the said trustees, their and each of their successor or successors in trust, for the security of the bonds and coupons to be issued hereunder and for the uses and purposes hereinafter expressed, namely:

Article I.

Until default shall be made in the payment of the principal or interest secured by said bonds, or some of them and such default shall have continued for a period of six months, as hereinafter set forth, the railway company shall be permitted to possess, manage, operate and enjoy all and singular the mortgaged premises, with their appurtenances and to take, demand, use and enjoy the rents, incomes, profits and issues of all and singular the premises and property hereby conveyed in the same manner and to the same effect as if this indenture had not been made.

Article II.

It being as hereinbefore recited one of the objects and intentions of this indenture to borrow money by means of bonds to be issued hereunder, for the purpose of paying off, funding, exchanging and retiring the present outstanding bonds of the railway company secured by mortgages or deed of trust upon some portion or all
132 of the property as hereinbefore recited, it is therefore covenanted and agreed that ten thousand of the bonds to be issued hereunder and secured hereby, representing ten million dollars ($10,000,000) of principal obligation, and being numbered from 1 to 10,000, both inclusive, shall from time to time be signed, sealed, and executed by said railway company, and thereupon certified by the trust company and used exclusively for the purpose of exchanging for bonds of the railway company now outstanding representing an equal amount of principal and secured by some one of the three several mortgages or deeds of trust hereinbefore recited, that is to say:

Of the issue of its bonds amounting to three million dollars ($3,000,000), secured by its before mentioned mortgage, dated July 1, 1880, and covering the mainline of railroad.

Of an issue of its bonds amounting to two million three hundred thousand dollars ($2,300,000), secured by its before mentioned mortgage, dated August 10, 1881, and covering the air-line division of such railroad.

Of an issue of its bonds called consolidated bonds, amounting to four million seven hundred thousand dollars ($4,700,000), secured by its before mentioned mortgage, dated January 1, 1886, and covering its entire line of railroad and appurtenances.

Such bond exchanges shall be made and conducted upon the terms and methods and subject to such conditions as may be agreed upon between the railway company and the said trust company.

Whenever any of the mortgage bonds of the railway company of either of the three classes aforesaid and now outstanding shall be exchanged for a bond of the series to be issued under this indenture, the said trust company shall thereupon stamp upon the
133 face of each of said retired and exchanged bonds that the same is payable only to it as trustee hereunder, and shall thereafter hold the same in trust uncancelled, but wholly as collateral security for the payment of all the bonds issued or to be issued under this mortgage. Each and every of such exchanged bonds so held by said trust company and each and every of the present oustanding three mortgages, or deeds of trust executed by the railway company shall remain in full force and effect in all respects until all the entire series of outstanding bonds of either one of said three different issues shall by purchase or exchange be retired and be delivered unto the said trust company and until such time each and every of such bonds and the mortgages to secure the same shall retain all their liens, priorities and legal rights as fully as if this instrument had not been executed. The trust company as the holder in the trust of such uncancelled bonds for the security and protection of the bonds from time to time issued under this mortgage shall have and exercise the same rights to enforce the mortgage under which any of said uncancelled bonds were issued, equally with any other holder of bonds of that class.

Whenever the entire series of bonds authorized and now outstanding of either of the three classes of securities designed to be so retired and exchanged shall actually have come by purchase, exchange or retirement into the possession of the said trust company as aforesaid, then it shall take the necessary and proper means to cause the mortgage or deed of trust executed by the railway company to secure that class of bonds, of which the whole issue has been exchanged, to be satisfied and cancelled of record and shall thereupon also cause the said whole issue of bonds of that class in its hands to be cancelled and destroyed.

134 It is expressly agreed that pending the ultimate cancellation of such exchange bonds the payment of interest upon all the bonds which may be issued and outstanding under this mortgage, shall be deemed a satisfaction of all interests accrued up to the time of such payment, upon any and all of the exchanged and retired bonds held in trust by the trust company and no interest shall be deemed or held to be payable upon any of such exchanged, retired and uncancelled bonds until after default in the payment of interest on the bonds secured by this mortgage.

Article III.

The said trust company shall, upon the execution, delivery and record of this mortgage, and upon the request of the board of directors

or the executive committee of the railway company, certify bonds hereunder to the amount, at face value, of two million eight hundred thousand ($2,800,000) dollars, such bonds being numbered from 10,001 upward and shall deliver the same to the said railway company.

Any additional bonds shall be certified and issued hereunder subject to the following conditions and limitations, viz:

Whenever any mileage of main track of railroad, in addition to its present system hereby conveyed, shall be from time to time acquired or built by the said railway company, either by purchase, construction, consolidation or otherwise, and whether within or without the State of Indiana, and when such fact shall be made to appear to the said trust company by a certificate of the president or vice-president of the railway company, and an affidavit of its chief engineer, showing the exact length of the main track of additional railroad or railroads so acquired or built and the termini
135 thereof and in what State and counties the same is situate and upon the recording of this mortgage or deed of trust, and such other proper deed of further assurance in such counties as may be deemed necessary, according to the laws of the State or States in which such additional railroad shall be situate, said trust company shall, upon the request of the board of directors or the executive committee of the said railway company, certify and deliver to the latter such further issue of bonds hereunder, at the rate of, but in no event exceeding, the amount at face value of twenty-five thousand dollars per mile of the main track of railroad so acquired or created, provided, however, that if any additional railroad acquired by the said railway company, either by purchase, consolidation or otherwise, shall be already subject to any mortgage which is unsatisfied, then the amount of any such outstanding bonds, secured by such unsatisfied lien shall be stated in the certificate of the president or vice-president of the said railway company and thereupon the trust company shall only certify hereunder and deliver bonds to such an amount when added to such outstanding bonds secured by the unsatisfied mortgage, on such acquired additional railroad as will not exceed a total issue of twenty five thousand ($25,000) dollars per mile of such main track so acquired.

The certificate of the president or vice-president and the affidavit of the chief engineer of such railway company shall in all cases be conclusive as to the mileage and liens recited and shall constitute full and complete authority for the said trust company, to certify and deliver bonds hereunder at the rate per mile herein provided for.

It is also expressly agreed that the said trust company shall from time to time, on request of the board of directors or executive
136 committee of the said railway company, certify and deliver bonds hereunder (subject always to the limitation of twenty five thousand ($25,000) dollars per mile of main track) to effect the simultaneous exchange or retirement of a like amount of any bonds

which may constitute a prior and specific lien on any additional railroad property at the time when it may be hereafter acquired by the said railway company, party of the first *part*.

Article IV.

In case default in the payment of interest of any of the bonds secured by this indenture, shall be made and shall continue for the space of six months after such payment shall be duly demanded, then the trustees may, and if requested in writing by the holders of the majority of the bonds secured hereby and then outstanding, shall enter upon all and singular the mortgaged premises and every part thereof, and possess, operate, use and enjoy the same; and upon demand in writing be made by the trustees, the railway company shall immediately surrender possession of all and singular the mortgaged premises and property of every sort and description to the trustees. It shall also be lawful for the trustees, in case such default shall be made and continue as aforesaid and payment be demanded and in case such request of bondholders be made, as aforesaid, they shall do so, to sell and dispose of all the premises and property of every sort and description, hereby conveyed, at public auction, in the city of New York or in Chicago, Illinois, as the trustees may elect (such election, however, being subject to a right on the part*y* of a majority in amount of the bondholders to designate at which of the two said pal*c*es the sale shall be made), having first given notice of the time and place of such a sale by advertisement published not less than once a
137 week, for three months next preceding the time specified for the sale, in one or more newspapers published in the city of New York, and in one or more newspapers published in the city of Chicago, Illinois, and to adjourn the said sales from time to time, by announcement at the time and place advertised, without further advertisement, and to make and deliver to the purchaser or purchasers good and sufficient deed or deeds, in fee simple, which sale being made to the highest bidder, shall be a perpetual bar both at law and in equity against the railway company and all other persons lawfully claiming the above described premises and property, or any part thereof, or any lien upon or interest in the same, through or from the said railway company, and after deducting from the proceeds of such sale a just allowance for all expenses thereof, including reasonable attorney and counsel fees, and any other necessary expenses incurred by the trustees in executing their trusts, including their own reasonable compensation, to apply the proceeds to the payment of the principal of such of the aforesaid bonds as may be at the time outstanding and unpaid, whether the same shall or shall not have previously become due according to their tenor, and of the interest which shall at that time have accrued on said principal and be unpaid, without discrimination or preference, but ratably according to the aggregate amount of such unpaid principal

and such accrued and unpaid interest, and if after satisfaction thereof a surplus shall remain, to pay the same over to the railway company.

Article V.

In case default in the payment of interest on any of the bonds secured by this indenture shall be made and shall continue for
138 the space of six months after such payment shall be duly demanded, then the trustees if they shall elect so to do, may, and if requested in writing by the holders of one-half of the bonds secured hereby and then outstanding shall apply to some court or courts having proper jurisdiction in the premises for a foreclosure of this deed of trust or mortgage and sale of the mortgaged premises and property therein embraced, and for the appointment in the meantime of a receiver of all the mortgaged premises under this indenture whether now owned or hereafter to be acquired. In the event of such right of foreclosure and sale accruing for non-payment of interest, immediately thereupon the whole amount of the principal of the bonds secured by this indenture, and then outstanding, shall at the option of a majority in amount of the holders of all bonds issued hereunder and then outstanding to be expressed in writing to the trustees, become at once due and payable.

Article VI.

If the trustees shall enter upon the mortgaged premises and take possession, control, and management thereof under any preceding provision, they shall apply and administer the net revenue and income arising from the mortgaged premises during such possession, in the discharge and satisfaction of interest, or interest and principal, secured by this indenture, as the same may become due and payable and in due order of priority. During such possession, occupation, control, and management, the trustees shall only be liable for the exercise of good faith and of reasonable diligence and all expense, loss and damage of every kind and nature growing out of such possession, control and management shall, to the extent that any liability is incurred thereby, constitute a charge upon the mortgaged premises exclusively.
139 The trustee during such possession shall have the right and power to manage the property and premises and may enter into any and all contracts proper, ordinary and usual in such cases and generally do and perform such things in the premises as the railway company itself might do and perform had it remained in undisputed possession and control of the said property.

Article VII.

And right of action under this indenture is vested exclusively in the trustees and under no circumstances shall any bondholder or

any number of bondholders have any right to institute an action or other proceeding on or under this indenture for the purpose of enforcing any remedy herein and hereby provided; and all actions and proceedings, whether by suit, entry or otherwise, for the purpose of enforcing the provisions of this indenture shall be instituted and conducted by the trustees according to their sound discretion until the owners and holders of a majority of the bonds secured hereby and then outstanding shall unite in requesting in writing the trustees to do or refrain from doing some particular act or acts, or to pursue or to refrain from pursuing any particular line of conduct or policy connected with the enforcement of such security, accompanying such request with evidence to the satisfaction of the trustees that they are such actual owners of bonds and also with satisfactory indemnity to the trustees for all expenses and costs of every kind and also for all possible claims for damages; in which event the trustees shall conform to and carry out such written instructions and such written request and direction, and the acts of the trustees done in execution thereof shall be binding on all holders of bonds issued hereunder.

140

Article VIII.

In case of any sale of the premises embraced in this mortgage under a decree of any court having jurisdiction thereof, based on the foreclosure of this mortgage, or in pursuance of advertisement without such decree as aforesaid, the trustees may, in their discretion, purchase, and they are hereby fully authorized and empowered to purchase the premises, property and franchises embraced herein, for the use and benefit of the holders of the then outstanding bonds secured by this mortgage and having so purchased the said premises, property and franchises, the right and title thereto shall vest in the trustees, and no bondholders shall have any claim thereto or to the proceeds thereof, except for his *pro rata* share of the proceeds of said purchased premises, property and franchises, as represented in a new company or corporation, to be formed for the use and benefit of the holders of the bonds secured hereby and then outstanding; and the trustees may take such lawful measures as they may deem best for the interest of the bondholders, to organize or procure the organization of a new company or corporation for the benefit of the holders of the bonds secured by this indenture and then outstanding. The said new company or corporation shall be organized upon such terms, conditions and limitations and in such manner as the holders of a majority of the then outstanding bonds secured by this mortgage shall in writing request or direct; and provision may, if such majority shall so select, but not otherwise, be made in the organization of such new company or corporation for the interests of any or all of the holders of junior obligations of the railway company and for its stockholders and simple contract creditors or any

of them, and the trustees so purchasing shall thereupon con-
141 vey the premises, property and franchises, so purchased by them, to such new company or corporation.

Article IX.

The railway company reserves and retains for itself its successors and assigns the right to sell, lease, and otherwise dispose of, free from the lien of this mortgage, or deed of trust, any real or personal property now covered or effected, or hereafter to be covered or effected, by this mortgage, which may no longer be required by the railway company, for the purposes of its incorporation; provided however, that the proceeds of such sale, lease or disposition, shall be received by the trustees, if deemed necessary for the protection of the bonds issued hereunder, and be applied by them to the purchase of other property in the name of the railway company, to be subject to the lien hereof, or be applied to the purchase of bonds secured hereby, which said bonds shall be thereupon cancelled. Any conveyance by the railway company of any such real or personal property, in which the trustees shall join, shall convey the same free and discharged of any lien hereby created, if a recital to such effect shall be contained in such conveyance, but not otherwise; and in case of such recital this indenture shall as to the property so conveyed, be thereafter void and of no effect, and no obligation shall be imposed on the purchaser to see — the application of the purchase money.

Article X.

No holder of any bond hereby secured shall have recourse for payment to any stockholder of the railway company, or to any person who has ever been such stockholder, or make any demand
142 for the payment of any such bond against any such person under and in pursuance of any law imposing liability upon any stockholders of incorporated companies, whether such a law be now in force or shall hereinafter be enacted, or by reason of any cause whatever, and the railway company hereby expressly waives the benefit of any appraisal, stay or exemption law that may now or at any time be in force, and consents that any sale that may be had under the provisions of this mortgage shall be had in the same manner, and to the same effect, as if such appraisal, stay or exemption law did not exist.

Article XI.

If the railway company shall well and truly pay the sums of money due upon the said bonds secured hereby, and the coupons thereto attached, required to be paid by it, which it hereby covenants to do, and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby entered into and required to be kept and performed according to the true intent

and meaning of these presents, then in that case, the estate, right, title, and interest of the trustees in the above described mortgaged property and premises shall cease, determine and become wholly void.

The trustees shall only be responsible for reasonable diligence in the management of the trust and shall not be answerable in any case for the act or default of any agent, attorney or employé selected with reasonable discretion. The trustees shall be entitled to be reimbursed for all proper outlays of every sort and nature, by them incurred in the discharge of this trust and to receive a reasonable and proper compensation for any duty they may at any time perform in the discharge of the same; and all such fees, com-
143 missions, compensations and disbursements shall constitute a lien on the mortgaged property and premises.

Article XII.

In case the office of trustee under this indenture shall become vacant by reason of incapacity, removal or resignation of the said parties of the second part, or either of them, or any successor, it shall be lawful for the holders of a majority in amount of the bonds hereby secured and then outstanding, to appoint a successor or successors, by a writing by them signed and upon such appointment being made and said trust being accepted and written notice thereof to said railway company, any such successor or successors, substituted trustee or trustees, shall, without further act or deed, become vested with all and singular, the estate, right and powers, and shall perform all the duties of trustees in like manner and with the same effect as if it, they or he had been named in this instrument as trustee or trustees.

The word "trustee," "trustees," or "successors," wherever used in this instrument, shall mean the trustees under this mortgage for the time being, whether original or substituted with all the powers appertaining to its, his or their office.

Article XIII.

The railway company hereby agrees that it will well and truly pay the sum of money in the said bonds and in each and all of them mentioned, together with the semi-annual interest due and to become — thereon, at the time and in the manner and at the places specified therein; and further that it will well and truly pay, or cause to be paid, all taxes, charges, rates, levies and assess-
144 ments imposed, assessed or levied, or which may hereafter be imposed, assessed or levied, upon the premises and property hereby mortgaged, conveyed and assigned, or intended so to be, or any part thereof, and shall and will, at its own proper cost, expense and charge, do or cause to be done, all *acts* and things necessary and proper to be done or performed, in order

to preserve and keep valid and in tact this lien or incumberance upon all and singular the property and premises above described. The said railway company further agrees that it will, at all times hereafter maintain an office or agency in the city of New York for the registration of and the payment of interest upon the bonds issued hereunder.

Article XIV.

It is expressly agreed that no bond of this issue shall be valid until the certificate on the bank thereof has been duly signed by the said trust company and that all bonds certified and issued hereunder shall have equal rights and security, no matter when the same are issued.

Article XV.

If the railway company or its successors, shall well and truly pay, or cause to be paid, the several principal sums of money evidenced by the bonds legally issued at any time hereunder and the coupons thereto attached, as they severally mature, according to the true intent and meaning of these presents, then and in such case the estate, right, title and interest of the trustees, parties of the second part, in and to each and every part of the property hereby mortgaged or intended to be, shall at once, and without further act or deed, cease and determine and this indenture shall thenceforth become void and of no effect.

145 And it is further covenanted and agreed, by the railway company to and with the trustees, that it will, from time to time and at all times, upon reasonable request, make execute, acknowledge and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assurance unto the trustees, upon the trusts and for the purposes herein expressed or intended, all and singular the property of every sort and description hereby mortgaged or conveyed in trust, or appearing, purporting, or intended to be, now owned, or possessed by, or vested in the said railway company, or that may hereafter be owned, possessed, acquired or vested in the railway company, as by the trustees of their counsel learned in the law shall be reasonably devised, advised or required.

In witness whereof, the said Louisville, New Albany and Chicago Railway Company, the said party of the first part has caused these presents to be signed by its president, sealed with its corporate seal, and attested by its secretary; and to testify their acceptance of the trust hereby created, the said Central Trust Company of New York has caused this instrument to be signed in its behalf by its president, sealed with its corporate seal and attested by its secretary, and

the said John H. Stotsenburg has hereunto affixed his hand and seal the day and year first above written.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY,
By WM. L. BREYFOGLE, *President.*

Witness:
JOHN MARSHALL.
JOHN B. HUGHES.

Attest:
[L. S.] W. H. LEWIS, *Secretary.*

CENTRAL TRUST COMPANY OF NEW YORK,
By F. P. OLCOTT, *President.*

146 Attest:
[L. S.] C. H. P. BABCOCK, *Secretary.*

Accepted.

JOHN H. STOTSENBURG.

STATE OF ILLINOIS, }
County of Cook, } ss:

Be it remembered, that on this third day of May, A. D. 1890, before me, a notary public, residing in said State and county personally appeared William L. Breyfogle, president of the Louisville, New Albany and Chicago Railway Company, personally known to me to be the president of said company and personally known to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, in behalf of said railway company, and by authority of its board of directors, had signed and delivered the said instrument, as the free and voluntary act of the said railway company, for the uses and purposes therein set forth; also personally appeared before me at the same time William H. Lewis, secretary of the said railway company, personally known to me to be such secretary, and personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged that he, on behalf of said railway company and by like authority has signed the said instrument, and affixed thereto the official corporate seal of the said railway company, as the free and voluntary act of the said Louisville, New Albany and Chicago Railway Company for the uses and purposes therein set forth, that he knew the corporate seal of said company and that the seal so affixed, is said corpo*real* seal.

In witness whereof, I have hereunto set my hand, and affixed my official seal this third day of May, 1890.

147 [L. S.]

WILLIAM S. KINNAN,
Notary Public.

STATE OF INDIANA, } ss:
County of Floyd, }

The foregoing instrument was filed for record in the recorder's office of Floyd county, on the seventh day of May, A. D. 1890, at two o'clock in the afternoon of that day, and duly recorded in Book 20 of Mortgages, on page one and following.

CHARLES W. SCHINDLER,
[L. S.] *Recorder of Floyd County.*

STATE OF INDIANA, } ss:
County of Clarke, }

The foregoing instrument was filed for record in the recorder's office of Clarke, county, on the seventh day of May, A. D. 1890, at four o'clock in the afternoon of that day, and duly recorded in Book 18 of Mortgages, on page 129 and following.

CHRISTOPHER PEASELEY,
[L. S.] *Recorder of Clarke County.*

STATE OF INDIANA, } ss:
County of Washington, }

The foregoing instrument was filed for record in the recorder's office of Washington county, on the 8th day of May, A. D. 1890, at 9½ o'clock in the forenoon of that day, and duly recorded in Book 76 of Mortgages, on page 304 and following.

J. S. HAMILTON,
[L. S.] *Recorder of Washington County.*

148 STATE OF INDIANA, } ss:
County of Orange, }

The foregoing instrument was filed for record in the recorder's office of Orange county on the ninth day of May, A. D. 1890, at 6 o'clock in the afternoon of that day, and duly recorded in Book 9 of Mortgages, on page 291 and following.

WILLIAM W. WORRILL,
[L. S.] *Recorder of Orange County.*

STATE OF INDIANA, } ss:
County of Lawrence, }

The foregoing instrument was filed for record in the recorder's office of Lawrence county, on the ninth day of May, A. D. 1890, at 10 o'clock in the forenoon of that day, and duly recorded in Book 13 of Mortgages, on page 495 and following.

JAMES H. McPHEETERS,
[L. S.] *Recorder of Lawrence County.*

STATE OF INDIANA, *County of Monroe,* } ss:

The foregoing instrument was filed for record in the recorder's office of Monroe county, on the 12th day of May A. D. —, at 11 o'clock in the forenoon of that day, and duly recorded in Book O of Mortgages, on page 5 and following.

[L. S.]

DILLON TALBOTT,
Recorder of Monroe County.

149 STATE OF INDIANA, *County of Owen,* } ss:

The foregoing instrument was filed for record in the recorder's office of Owen county, on the 14th day of May, A. D. 1890, at 10 o'clock in the forenoon of that day, and duly recorded in Book N of Mortgages, on page 358 and following.

[L. S.]

R. McCLAREN,
Recorder of Owen County.

STATE OF INDIANA, *County of Putnam,* } ss:

The foregoing instrument was filed for record in the recorder's office of Putnam county, on the 15th day of May A. D., 1890, at 9 o'clock in the forenoon of that day, and duly recorded in Book 14 of Mortgages, on page 1 and following.

[L. S.]

DANIEL S. HUNT,
Recorder of Putnam County.

STATE OF INDIANA, *County of Montgomery,* } ss:

The foregoing instrument was filed for record in the recorder's office of Montgomery county, on the 15th day of May A. D. 1890, at 2 o'clock in the p. m. of that day, and duly recorded in Book 33 of Mortgages, on page 118 and following.

[L. S.]

THOS. T. MUNHALL,
Recorder of Montgomery County.

150 STATE OF INDIANA, *County of Tippecanoe,* } ss:

The foregoing instrument wad filed for record in the recorder's office of Tippecanoe county, on the 16th day of May, A. D. 1890, at 9 o'clock, in the a. m. of that day, and duly recorded in Book 50 of Mortgages, on page — and following.

[L. S.]

J. W. McCREA,
Recorder of Tippecanoe County.

STATE OF INDIANA, } ss:
County of White, }

The foregoing instrument was filed for record in the recorder's office of White county, on the 17th day of May A. D. 1890, at 9 o'clock in the a. m. of that day, and duly recorded in Book 30 of Mortgages, on page 388 and following.

[L. S.] JAMES P. SIMONS,
Recorder of White County.

STATE OF INDIANA, } ss:
County of Pulaski, }

The foregoing instrument was filed for record in the recorder's office of Pulaski county, on the 21st day of May, A. D. 1890, at 2 o'clock in the afternoon of that day, and duly recorded in Book W of Mortgages, on page 41 and following.

[L. S.] L. E. McKINSEY,
Recorder of Pulaski County.

151 STATE OF INDIANA, } ss:
County of Stark, }

The foregoing instrument was filed for record in the recorder's office of Stark county on the 22nd day of May A. D. 1890 at 10:45 o'clock in the forenoon of that day, and duly recorded in Book L of Mortgages, on page 45 and following.

[L. S.] JACOB BOZARTH,
Recorder of Stark County.

STATE OF INDIANA, } ss:
County of Laporte, }

The foregoing instrument was filed for record in the recorder's office of Laporte county, on the 22nd day of May A. D. 1890, at 8 o'clock in the forenoon of that day, and duly recorded in Book 27 of Mortgages, on page — and following.

[L. S.] D. J. McMURRAY,
Recorder of Laporte County.

STATE OF INDIANA, } ss:
County of Marion, }

The foregoing instrument was filed for record in the recorder's office of Marion county, on the 19th day of May, A. D. 1890 at 4¼ o'clock in the p. m. of that day, and duly recorded in Book 194 of Mortgages, on page — and following.

[L. S.] CHRISTIAN BRINK,
Recorder of Marion County.

152 STATE OF INDIANA, } ss:
County of Hamilton, }

The foregoing instrument was filed for record in the recorder's office of Hamilton county on the 21st day of May A. D. 1890, at 9 o'clock in the a. m. of that day, and duly recorded in Book 9 of Mortgages, on page 1 and following.

[L. S.]

G. N. HOLLIS,
Recorder of Hamilton County.

STATE OF INDIANA, } ss:
County of Boone, }

The foregoing instrument was filed for record in the recorder's office of Boone county, on the 21st day of May A. D. 1890, at 7 o'clock in the a. m. of that day, and duly recorded in Book 30 of Mortgages, on page 1 and following.

[L. S.]

FRANCIS M. MOODY,
Recorder of Boone County.

STATE OF INDIANA, } ss:
County of Clinton, }

The foregoing instrument was filed for record in the recorder's office of Clinton county, on the 19th day of May, A. D. 1890, at 11 o'clock in the forenoon of that day, and duly recorded in Book 36 of Mortgages, on page 442 and following.

[L. S.]

W. M. WOOD,
Recorder of Clinton County.

153 STATE OF INDIANA, } ss:
County of Carroll, }

The foregoing instrument was filed for record in the recorder's office of Carroll county on the 19th day of May A. D. 1890, at 8 o'clock in the forenoon of that day, and duly recorded in Book Nine of Mortgages page one and following.

[L. S.]

CHAS. WILLIAMS,
Recorder of Carroll County.

STATE OF INDIANA, } ss:
County of Jasper, }

The foregoing instrument was filed for record in the recorder's office of Jasper county, on the 16th day of May A. D. 1890, at 4 o'clock in the afternoon of that day, and duly recorded in Book 19 of Mortgages, on page 295 and following.

[L. S.]

JAMES F. ANTRIM,
Recorder of Jasper County.

STATE OF INDIANA, } ss:
County of Newton, }

The foregoing instrument was filed for record in the recorder's office of Newton county, on the 20th day of May, A. D. 1890, at 11 o'clock in the forenoon of that day, and duly recorded in Book 22 of Mortgages, on page 215 and following.

[L. S.] JOHN HIGGINS,
Recorder of Newton County.

154 STATE OF INDIANA, } ss:
County of Lake, }

The foregoing instrument was filed for record in the recorder's office of Lake county, on the 23rd day of May, 1890 and 11 o'clock in the forenoon of that day, and duly recorded in Book 22 of Mortgages, on page 1 and following.

[L. S.] ED. P. AMES,
Recorder of Lake County.

STATE OF KENUTCKY, }
County of Jefferson. }

The foregoing instrument was filed for record in the clerk's office of Jefferson county court on the twenty-sixth day of May, 1890, at 10 o'clock in the forenoon of that day, and duly recorded in Book 352 of Mortgages, on page 2 and following.

[L. S.] GEO. H. WEBB,
Clerk of Jefferson County Court.

STATE OF ILLINOIS, } ss:
County of Cook, }

1,275,008.

The foregoing instrument was filed for record in the recorder's office of Cook county, Illinois, on the 24th day of May, 1890, at 9 o'clock in the forenoon of that day, and duly recorded in Book 2871 of Records, on page 444 and following.

[L. S.] JOHN STEPHENS,
Recorder of Cook County.

155 STATE OF INDIANA, } ss:
County of Greene, }

The foregoing instrument was filed for record in the recorder's office of Greene county, Indiana, on the 13th day of May, 1890, at 1 o'clock in the p. m. of that day, and duly recorded in Book T of Mortgages on page 438 and following.

[L. S.] JOSEPH G. SMITH,
Recorder of Greene County.

156 *Mortgage L., N. A. & C. to Cent. Trust Co.*

Plaintiff offered in evidence the record of a mortgage made by the Louisville, New Albany and Chicago Railway Company to the Central Trust Company of New York, dated September first, 1894, appearing on Mortgage Record No. 41, page 75, *et seq.*, of record of mortgages in White county, (it being admitted by the parties that this Mortgage Record 41, — on file in the recorder's office of White county, Indiana, and in the custody of the recorder).

Defendants objected to the introduction of this mortgage, on the ground that there is nothing described in the mortgage except the property then occupied and used by the railway company for railroad purposes and such other property as it might thereafter acquire for railroad purposes, and does not describe this property, and the further objection, that the owner of these lands was no party of this mortgage; defendants objected further, because a mortgage recorded in White county would not establish a lien on lands in Pulaski county.

By the COURT: What is the purpose of this evidence?

By Judge FIELD: The purpose is to show that this railroad company gave to the Central Trust Company of New York, a mortgage upon all its property along the entire line of its road in this State; I want to show too that the mortgages were all foreclosed, and this is for the purpose of showing an executed mortgage.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted; and the said mortgage being then read and given in evidence was in the words and figures following, to-wit:

157 This indenture made and entered into this first day of September one thousand eight hundred and ninety four by and between the Louisville New Albany and Chicago Railway Company a corporation duly created and existing under the laws of the State of Indiana party of the first part and the Central Trust Company of New York a corporation duly created and existing under the laws of the State of New York hereinafter called the trust company and James Murdock of Lafayette in the State of Indiana parties of the second part.

Whereas the party of the first, part owns and is operating a system of rail roads in the State of Indiana about five hundred and twelve miles in length, which is composed of a line from New Albany on the Ohio river to Michigan City on Lake Michigan hereinafter called the main line, a line from Indianapolis to a junction with the Chicago and Western Indiana railroad at a point on the State line between Indiana and Illinois, about twenty miles south east of Chicago hereinafter called the Air line together with certain proprietary and leas-hold interests in the franchises and railroads of the said

Chicago and Western Indiana Railroad Company and the Belt Railway Company of Chicago and in the terminal facilities of the said companies in and near the city of Chicago Illinois, and all its real estate, buildings, tracks trackage and terminal rights, facilities and franchises in the other cities above mentioned, and in the city of Louisville in the State of Kentucky and between said city of Louisville and the city of New Albany, and in the city of Indianapolis, Indiana and is also the exclusive owner of the French Lick Springs rail roads.

And whereas there are now existing certain liens upon said system of railroads, including a certain mortgage made July. 1st. 1880 by the party of the first part to John C. New of
158 Indianapolis and Washington C. De Pauw of New Albany in the State of Indiana as trustees, and a certain mortgage made August 10th, 1881 by the party of the first part to John C. New of Indianapolis as trustee and a certain mortgage made January 1st, 1886 by the party of the first part, to the Farmers Loan and Trust Company of the City of New York and John H. Barker of Michigan City as trustees and a certain mortgage made May 1st. 1890 by the party of the first part to the Central Trust Company of New York and John Stotsenburg of New Albany as trustees.

And whereas the railway company has in its possession and use certain railroad equipment and rolling stock of the original cost of one million two thousand two and thirty four dollars such equipment consisting of the following five certain parcels that is to say,

1. Three hundred box cars built by the Haskell & Barker Car Company costing one hundred and forty thousand and ten dollars.

2. Two hundred and fifty flat cars built by the Haskell and Barker Car Company costing ninety six thousand two hundred and fifty dollars.

3. Two hundred coal cars and fifty stock cars built by the Haskell & Barker Car Company costing one hundred and two thousand seven hundred and fifty dollars.

4. Three hundred box cars and two hundred and fifty flat cars built by Oliver Adams, agent, costing two hundred and ninety three thousand two hundred and twenty four dollars.

5. One thousand flat cars built by the Haskell & Barker Car Company costing three hundred and seventy thousand *thousand* dollars.

And the title to the equipment above mentioned is at present in the builders thereof, and the railway company desires to
159 acquire the title to the same, said equipment being necessary in the operation of its said rail road.

And whereas, the railway company in the exercise of the powers in that behalf possessed by it under the laws of the State of Indiana, and in order to provide means to purchase said equipment and to obtain the title thereto and in accordance with resolutions duly adopted by its board of directors and by its stockholders at meetings of said board of directors and of said stockholders, duly and regularly called and held has determined to issue its bonds to be known

as equipment five per cent. sinking fund mortgage gold bonds aggregating an amount not exceeding one million dollars in gold coin of the United States of America, said bonds to be for one thousand dollars each, payable twenty years from December 1–1894 unless sooner paid out of the sinking fund to be provided for payment of the same, or unless the railway company shall elect to pay the same before that time, and to bear interest from the first day of December, 1894, payable semi-annually at and after the rate of five per cent. per annum in like gold coin on the first days of June and December in each and every year;

And whereas the said bonds and the interest warrants to be annexed thereto, and the trustees' certificate to be endorsed thereon are to be in the form or substantially the form following, that is to say;

UNITED STATES OF AMERICA,

No. —. *State of Indiana.* $1,000.

Louisville, New Albany and Chicago Railway Company Equipment Five Per Cent. Sinking Fund Mortgage Gold Bond.

Issue limited to $1,000,000.

The Louisville, New Albany and Chicago Railway Company, a corporation of the State of Indiana, for value received hereby
160 promise to pay to the Central Trust Company of New York or to the bearer hereof the sum of one thousand dollars in gold coin of the United States of the present standard of weights and fineness, at the office or agency of said railway company in the city of New York on the first day of December, in the year of one thousand nine hundred and fourteen (unless this bond be sooner redeemed as provided in the mortgage hereinafter mentioned) and to pay interest thereupon in the meantime from the first day of December, one thousand eight hundred and ninety four, at the rate of five per cent. per annum, payable semi-annually in like gold coin on the first days of June and December in each year at said office or agency upon presentation of the coupons hereto annexed as they severally become due.

The principal and the interest of this bond is payable without relief from valuation or appraisement laws; this bond is one of a series of bonds of like tenor and effect numbered consecutively from one upwards and secured by indenture of mortgage or deed of trust to the Central Trust Company of New York and James Murdock of Indiana, as trustees dated September 1st, 1894, covering the equipment proposed to be acquired by means of the proceeds of said bonds as provided in said mortgage or deed of trust, and also all the other property of said railway company as specified and described in said mortgage or deed of trust.

This bond may at any time upon production thereof to said railway company and proper endorsement being made thereon, be

registered as to the principal thereof upon the books of the railway company in the name of the holder thereof and thereupon its transferability by delivery shall cease, and thereafter it can be transferred only by the registered holder or his attorney by transfer
161 duly made upon said books unless the last transfer shall have been made to bearer, and this bond shall be subject to successive registration and transfers to bearer at the option of the holder but such registration shall not restrain or effect the transferability of the coupons by delivery.

After six months' default in the payment of any semi-annual installment of interest thereon, the principal of all the bonds secured by said indenture of mortgage or deed of trust may be made immediately due and payable as prescribed therein. This bond is entitled to the benefit of the provisions of the sinking fund in said mortgage or deed of trust and may be paid prior to the maturity thereof at one hundred and five per cent. of the par value thereof and accrued interest thereon, as provided in said mortgage or deed of trust. This bond shall not be valid until the certificate endorsed hereon shall have been signed by the Central Trust Company of New York one of said trustees or its successors or successors in the trust, and it is issued and held under and subject to the terms and conditions of said mortgage or deed of trust.

In witness whereof the said Louisville, New Albany and Chicago Railway Company has caused its corporate seal to be hereto affixed and these presents to be signed by its president and attested by its secretary, and has caused each of the said coupons to be attested by the engraved signature of its treasurer this first day of September, one thousand eight hundred and ninety four.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY,

[SEAL.] By —— ——, *President.*

Attest: —— ——, *Secretary.*

162 (*Form of Coupon.*)

The Louisville, New Albany and Chicago Railway Company on —— will pay to bearer twenty-five dollars in gold at its office or agency in the city of New York, being six months' interest on its equipment five per cent. gold bond No. —.

—— ——, *Treasurer.*

(*Form of Trustee's Certificate.*)

Central Trust Company of New York hereby certifies that this — one of the bonds issued under the mortgage or deed of trust of the Louisville, New Albany and Chicago Railway Company bearing date September 1, 1894 and referred to herein.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee,*

By —— ——, *Vice-President.*

And whereas, such bonds are not to be entitled to share in the benefit or security of this mortgage or deed of trust unless they shall have endorsed thereon such certificate of the Central Trust Company of New York, or its successor or successors in this trust;

And whereas, the said coupons are to be issued with the engraved signature of the treasurer of the railway company it being however agreed by it that when thus issued such engraved signature shall be as binding as if the signature of such treasurer were affixed to such coupons in his own proper handwriting.

And whereas, by and in accordance with the resolutions of the board of directors and of the stockholders of the railway company adopted at meetings duly and regularly called and held, it has been determined to secure the payment of all the said bonds equally, principal and interest by this mortgage or deed of trust in the manner and to the effect hereinafter expressed;

Now, therefore this indenture witnesseth, that in considera-
163 tion of the premises and of the sum of one dollar to it paid by the said parties of the second part, the receipt whereof is hereby acknowledged, and to secure the payment of the principal and interest of all bonds issued hereunder according to the tenor and effect thereof without preference or priority, and equally and ratably the party of the first part hath granted, bargained, sold, aliened, remised, released conveyed and confirmed and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm unto the parties of the second part and to the survivor of them and their successors and assigns forever, all the railway systems and property of the said party of the first part of every kind and nature and however owned, held leased or enjoyed, together with all the equipment, appurtenances and franchises hereunto appertaining, being more particularly described as follows: All the present line of railway extending from New Albany Indiana to Michigan City in the same State and also from Indianapolis, Indiana to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago Illinois, and also its proprietary and owned line of railroad called the Bedford and Bloomfield railroad extending from Bedford to Switz City in Indiana; and also its other proprietary and owned line of railroad called the Orleans, West Baden and French Lick, Indiana; and also all its lands, station buildings, tracks and terminal facilities in the city of Louisville Kentucky; and also all its rights, interest proprietary and leasehold estate and terminal facilities in the franchise, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois. And also all its real estate, trackage, leasehold
164 and contract rights and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana; and also all its leasehold and contract rights trackage and terminal facilities vested in the party of the first part by virtue of

its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the city of New Albany, Indiana and the city of Louisville Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it being about five hundred and twelve miles in length and situate in the counties of Floyd, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake in the State of Indiana, and Cook county in the State of Illinois, and Jefferson county in the State of Kentucky, including and conveying by these presents all the property of every sort or nature real personal and mixed now owned by said railway company for the purpose of and connected with or appertaining to the railroads or railways above mentioned and described together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turn-tables, fences, walls, fixtures, franchises, privileges and rights of the railway company and also all the locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured, and unmanufactured materials, coal wood and supplies of every kind belonging or appertaining to the railway company; also all the tolls, incomes, issues and profits arising out of the said property and its operation, and all rights to receive and recover the same also all estate, right
165 title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands with the buildings thereon erected, it being the true intent and meaning of these presents that the said railway company party of the first part, shall and doth convey to the said trustee all and all manner of franchise of every kind and description all and all manner of real estate or interest therein, wherever such real estate may be situate and however derived and wherever situate, all and all manner of personal property, of whatever nature or description, the same may be, at the date of these — owned or possessed by the said railway company whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises or property of every kind and description, real, personal or mixed and wherever the same may be situate, that may at any time before or after the date of this indenture, be acquired by or for the said railway company for purposes connected with or appertaining to said railroads or railways hereby conveyed, all of which it is hereby covenanted shall enure by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder; it being

intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now own, as fully and to the same extent as if all such property were specifically described herein and
166 conveyed hereby.

To have and to hold all and singular the above mentioned and described railways premises and property, rights franchises and appurtenances unto the said parties of the second part their and each of their successor or successors and assigns forever; in trust nevertheless for the equal *pro rata* benefit and security of all the holders of all the said bonds secured hereby without any preference or priority by reason of priority in time of issue or negotiation thereof or otherwise and for the uses and purposes and upon the trusts, conditions, covenants and agreements hereinafter declared and expressed.

And in further consideration of the premises and of the mutual covenants and agreements hereinafter set forth and of one dollar paid by each party to each of the others, it is hereby expressly agreed by and between the partied hereto that the equipment and rolling stock at any time held or acquired by the parties of the second part or either of them their and each of their successor or successors as provided in this indenture are and shall be charged with the agreements, and are and shall be held by the trustees upon the trusts and for the uses and purposes following;

Article first. The railway company, in consideration of the undertakings and agreements of the trustees herein set forth hereby agrees forthwith to execute and issue in the form hereinbefore recited and to deliver to the trust company to be certified, issued and used for the purposes hereinafter described, bonds of the railway company intended to be secured hereby to an amount not exceeding one million dollars and the trust company shall thereupon endorse upon each of said bonds upon the order of the railway company or its president or secretary only at the time and in the manner
167 following, that is to say,

If and whenever the equipment and rolling stock included in any of the parcels hereinbefore described, shall be transferred to, and the title thereto vested in the trust company by proper instrument in writing, the trust company shall certify and deliver as aforesaid bonds of the issue hereby secured, the principal of which bonds shall be equal in amount to the cost of such parcel of equipment and rolling stock as hereinafter stated.

If the bonds remaining in the hands of the trust company at the time when the title to all of said equipment and rolling stock included in all of said parcels hereinbefore described shall have been so transferred to it, said trust company shall as soon as the title to all of said equipment and rolling stock shall have been so transferred to it certify as aforesaid all bonds of the issue above men-

tioned and intended to be hereby secured which shall still remain in its hands unissued.

Article second. The trust company agrees with the respective persons firms and corporations who shall at any time become the holders of the bonds or coupons issued hereunder, and with the railway company that it will hold all the rolling stock and equipment acquired by it with the bonds issued hereunder and intended to be hereby secured, as hereinbefore provided in trust under the provisions of this indenture for the equal benefit and security of all the persons, firms and corporations who shall at any time become holders of said bonds or coupons without priority, preference or distinction as to lien, or otherwise by reason of priority in time of the issue or negotiation of any said bonds so that all of said bonds shall have
the same right, lien and privilege under and by virtue of this
168 indenture with like effect as if they had all been executed, delivered and negotiated simultaneously on the date hereof.

Article third. The railway company agrees to pay the principal and interest of all bonds duly issued hereunder according to the terms thereof when such principal and interest shall become or be due according to the terms of said bonds and of the coupons for interest thereto appertaining without deduction from principal or interest for any taxes, assessments or governmental or other charges imposed on this deed of trust or mortgage, or on any bonds issued hereunder or on any property or franchise at any time covered hereby, the railway company hereby agreeing to pay the same, as the coupons appertaining to said bonds are paid they shall be cancelled and no purchase of any coupons nor any advance or loan thereon or redemption thereof by or on behalf of the railway company after the same have been detached from the bonds to which they belong shall keep such coupons alive or preserve their lien upon any of said property.

Article fourth. The railway company hereby covenants and agrees that until the payment of all the bonds secured hereby it will on or before the first day of September in each year, commencing with the first day of September one thousand eight hundred and ninety-eight pay to the trust company the sum of thirty thousand dollars which sum shall be applied by said trust company as a sinking fund and to the purchase of bonds secured hereby at the market rates, not exceeding one hundred and five per cent. of the par value thereof and accrued interest thereon. In the event that such bonds cannot be purchased at or below the said rate then the bonds secured hereby shall be subject to be drawn for
payment and paid as follows: If the trust company shall
169 not have been able to purchase said bonds at or below the said rate within thirty days after any such yearly payment shall have been made to it, said trust company shall draw by lot bonds secured by this mortgage to be paid for out of the moneys so paid to it at the rate of one hundred and five per cent. of the par value thereof and accrued interest thereon and the bonds so drawn shall

cease to bear interest from and after the day specified for that purpose in the public notice of such drawing, which public notice shall be given by publication thereof twice a week for eight successive weeks in a daily newspaper published in the city of New York, but the day so specified shall not be less than sixty days after such drawing. All of such bonds so purchased or drawn and the coupons appertaining thereto shall be held by said trust company uncancelled and shall continue to be secured hereby and said bonds shall continue to bear interest in like manner as the other bonds still outstanding and the coupons appertaining to such bonds so held by said trust company shall be paid by the railway company when and as the same shall mature, the railway company hereby agreeing to pay the same and any and all sums of money so received by said trust company for interest upon said bonds so held by it for the sinking fund shall be applied by it to the purchase or redemption of bonds at the time when and in the manner that the said yearly payments to be made by the railway company for the sinking fund are to be so applied. All bonds so held by the trust company for the sinking fund shall be stamped with the word- following: Held for the sinking fund of the Louisville, New Albany and Chicago Railway Company equipment five per cent. mortgage.

The railway company, if it shall elecrt so to do may, on any day on which interest is payable upon said bonds issued here-
170 under and secured hereby upon giving notice of its intentions so to do by publication thereof twice a week for ninety days in two daily newspapers published in the city of New York, pay all or any part of the said bonds issued here under and secured hereby at one hundred and five per cent. of the par value thereof and accrued interest thereon, and said bonds so to be paid shall cease to bear interest from and after the date mentioned in such notice as the date on which payment will be made.

In the event that the railway company shall not elect to pay all of said bonds outstanding at the time of such election the bonds to be paid shall be drawn by lot by the railway company and the numbers of the bonds so drawn to be paid shall be given in the published notice above provided.

Article fifth. Until default shall be made by the railway company its successors or assigns in the payment of the principal or interest of the said bonds or some of them or some part thereof or in the payment of the sinking fund hereinbefore provided to be paid for the purchase or redemption of said bonds, or some part of such sinking fund the railway company, its successors and assigns, shall be suffered and permitted to possess and enjoy the mortgaged premises hereby conveyed and transferred by it, with the appurtenances and all and singular the rights and franchises herein before described and hereby conveyed and transferred and to receive, take and use the tolls, revenues, incomes, earnings and profits thereof.

Article sixth. The trustees agree with the railway company that so long as there is no default by the railway company in the pay-

ment of the principal or interest of said bonds, or any of them, or any part thereof or in the payment of the sinking fund here-
171 inbefore provided to be paid for the purchase or redemption of said bonds or any part of such sinking fund and so long as there is no proceeding of any kind *or* against the railway company for the appointment of a receiver or for the foreclosure of any deed or trust or mortgage the railway company shall have and is hereby given the possession and use of the equipment and rolling stock of any — at any time acquired by the trust company under the provision hereof out of the proceeds of the bonds issued hereunder and secured hereby with the right to receive the earnings thereof.

Article seventh. The railway company agrees with the trustees and with the person- firms and corporations who shall at any time become holders of bonds or coupons issued under this indenture that it will hold and use said equipment and rolling stock in accordance with the provisions of this indenture, and will not transfer possession of any thereof to any other persons or corporations except temporarily in the usual course of traffic without the written consent of the trust company, and that in case possession of any of the equipment or rolling stock furnished for its use by the trust company as provided herein, shall in the course of traffic be transferred from the railway company to any other person or corporation, such other person or corporation so long as any of said equipment or rolling stock shall be in their possession, shall hold the same as bailee of the trust company and not of the railway company and shall be answerable to the trust company for the same and that the railway company in any arrangement it shall make with such other person or corporation in respect thereto, shall act only as the agent of the trust company and not on its own behalf.

The railway company further agrees that it will at its own
172 expense keep all the equipment and rolling stock at any time furnished for its use by the trust company as herein provided in good order and repair and will at once replace at its own cost any of the same which shall be destroyed from any cause, whatever during the continuance of its trust with other like equipment or rolling stock of equal value or with such other rolling stock or equipment of different character but of equal value as may be approved in writing by the trust company and that the railway company will promptly file with the trust company a statement in detail of the former equipment and rolling stock and of the equipment and rolling stock so provided in replacement thereof and that the railway company will make all repairs and replacements to the satisfaction of any competent inspector at any time selected by the trustees to examine the same and will cause all the rolling stock and equipment provided in replacement of any previously *covered* hereby to be transferred to the trust company by proper bills of sale or other instruments of transfer and free of lien, and will cause to be marked on each side of every article of rolling stock and equipment held or required by the authority of the trustees under the terms

and provision- and for the purpose of this indenture the words "Owned by Central Trust Company of New York, trustee Louisville New Albany and Chicago Railway Company equipment mortgage, and the proper number and will not allow the name or designation of any other company as owner to be placed on any such railroad equipment or rolling stock and will immediately restore any such marks of ownership at any time destroyed and will do such other acts as the trust company shall require for the full protection of the property and rights of the trustees and the holders of the bonds issued hereunder.

173 The railway company further agrees that it will through its general manager or other proper officer or agent furnish to the trust company yearly in the month of August during the continuance of this trust, or oftener if required by the trust company a statement of all the equipment and rolling stock then in use by the railway company hereunder with a special statement of the number and description of all such as shall have been destroyed and substituted during the year next preceeding, and that the trust company shall have the right to inspect the said equipment and rolling stock as often as it shall desire during the continuance of this trust by any person appointed by the trust company and that the railway company will provide the necessary means or necessary authority to enable such persons to travel without charge over the railroads on which a/y of such equipment or rolling stock may be for the purpose of making such inspection.

The railway company furtner agrees that it will insure all the equipment and rolling stock at any time furnished for its use by the trust company as herein provided, (including all replacements thereof) as the property and for the benefit of the trust company for such amounts as other similar railroad equipment and rolling stock are insured by the railway company and will keep the said equipment and rolling stock so insured until the bonds hereby secured are fully paid and will deposit the policies of insurance or certificates thereof with the trust company.

Article eighth. If default shall be made in the payment of any semi-annual installment of interest mentioned in the said bonds, or any part thereof according to the tenor and effect of said bonds and the coupons for the interest thereunto appertaining, and if

174 such default shall continue for a period of six months, then the parties of the second part or their successors or successor in the trust, may at their option, and upon being requested in writing by the holders of a majority in amount of the said bonds then outstanding shall declare the principal of all of said bonds to be immediately due and payable thereupon the principal of all of said bonds shall become due and payable forthwith anything in said bonds contained to the contrary notwithstanding, such declaration may be made by notice in writing to the party of the first part or by publication thereof once in some daily newspaper published in the city of New York.

Article ninth. If default shall be made in the payment of the principal or interest moneys mentioned in the said bonds or the coupons thereunto appertaining or any or either of them, or any part thereof, according to the tenor and effect of said bonds and coupons or either of them and such default if in payment of interest shall have continued for six months or if default shall be made in the payment of the sinking fund hereinbefore provided to be paid for the purchase or redemption of said bonds or some part of such sinking fund, and such default — payment of any sum required to be paid for said sinking fund shall have continued for six months or if proceedings of any kind shall be commenced by or against the railway company for the appointment of a receiver or for the foreclosure of any deed of trust or mortgage of the railway company then and in their discretion and upon being requested in writing by the holders of a majority in amount of the said bonds then outstanding, and upon being properly indemnified against cost and expenses which may be incurred by acting in pursuance of such request shall forthwith do any or all of the things following namely:—

175 1. Enter into and upon and take and hold possession of all and singular the premises, estates, franchises, rights, privileges and property hereby granted and conveyed to the parties of the second part or intended so to be and in person, or by one or more agents, operate the said railway, making from time to time all such repairs or replacements as they may deem judicious and all such useful alterations, additions and improvements as the income coming into their hands be adequate to pay for and take, collect and receive all fares, freights, tolls, earnings, issues, profits and income of said railways and property and apply such fares, freights, tolls, earnings, issues, profits and income to the proper expenses of holding, operating and managing the said railways and other premises and conducting the business thereof and payment of and for any and all taxes, assessments, charges, rental, or such liens superior to the lien of these presents upon said premises as they may deem proper, and all necessary and proper repairs replacements, alterations, additions, and improvements upon said property, and all expenses, costs, charges and counsel fees in the premises of the said parties of the second part or their successors in the trust and a reasonable compensation for their services and next to the payment of the interest and principal of the said bonds according to the tenor and effect thereof as the same may be or become due and payable; and in case the principal moneys secured by said bonds shall not have become due, the moneys applicable to the payment of interest shall be applied upon the interest warrants remaining in default in the order of their maturity; and in case the said principal moneys shall have become due the moneys applicable to the payment of the principal and interest *pro-rata* without any preference or

176 priority whatsoever.

2. After entry or without entry cause the whole value of the said premises, estates, franchises, rights, privileges, and property

hereby granted and conveyed to the parties of the second part or intended so to be with their appurtenances and all benefits and equity of redemptions of the said party of the first part and its successors and assigns therein or thereto to be sold at public auction in the city of Indianapolis in the State of Indiana or in the city of New York, in the State of New York, giving at least three months' previous notice of the time and place of such sale by publication publishing the same at least once in each week during such period of three months in two daily newspapers published in said city of New York and in two newspapers published in said city of Indianapolis and giving such other notice of such sale as may be required by law, if any other notice be so required. It shall be lawful for the said parties of the second part and their successors making such sale and they are hereby authorized and empowered as the attorney or attorneys of the party of the first part and its successors by these presents duly constituted and appointed for that purpose to make execute and deliver to the purchaser or purchasers on such sale all such deed and conveyance as shall be necessary or proper to convey to and vest in him or them the said premises, estates, franchises, rights, privileges and property, and every part and parcel thereof, and all of the estate, right, title and interest of the said party of the first part and its successors and assigns therein or thereto and such sale and the deeds and conveyances so to be thereupon executed shall be valid and effectual forever and shall be a perpetual bar in law and equity against
177 the said party of the first part and its successors and assigns, and against all persons claiming or to claim by from or under it or them or any of them. The receipt of the trustees or trustee who shall make the sale hereinbefore authorized shall be a sufficient discharge to the purchaser or purchasers at such sale for his or their purchase money and such purchasers, or purchasers, his or their heirs or assigns or personal representatives shall not, after paying such purchase money and receiving such receipts of such trustees therefor be obliged to see to the application of such purchase money upon or for the trusts or purposes of these presents, or be in anywise answerable for any loss, misapplication or non-application of such purchase money by the trustees or trustee.

3. Proceed by bill in equity or other proper proceeding in any court or courts of competent jurisdiction to foreclose this mortgage or enforce the rights, liens and securities of the trustees or trustee and the bondholders thereunder, and thereupon said trustees or trustee shall be entitled to have the said premises estates, franchises, rights, privileges and property hereby granted or conveyed to them or intended so to be sold by judicial sale under the order or decree of such court or courts for or towards the satisfaction of the principal and interest due or owing upon the then outstanding bonds issued under or entitled to the benefit of the security of this mortgage, and for the enforcement of the rights, liens and securities of the trustees or trustee and the bond-holders.

4. Demand of the railway company and of any other person or corporation then having the same the immediate possession of any or all of the existing equipment and rolling stock which shall have been furnished for the use of the railway company under the provisions of this deed of trust, including all replacement
178 thereof, and with such force as may be necessary enter upon the railroad and other premises of the railway company and of any other person or corporation on whose premises the same may be and take immediate and maintain exclusive possession of any or all of said equipment and rolling stock, and upon such retaking thereof, hold and use or operate the same or lease the same, or otherwise contract for the use thereof, making from time to time all proper repairs thereof and paying insurance, taxes and other necessary expenses connected therewith, and receive the earnings, rentals and profits thereof.

5. After such retaking proceed with or without the order or decree of any court of equity or other competent court having jurisdiction in the premises, to sell any or all of said equipment or rolling stock at public sale in such lots or amounts, on such notice and at sich times and at such places as the trustees or trustee or the court may determine and adjourn any sale from time to time and upon any such sale to transfer and deliver any property sold to the purchaser thereof by good and sufficient instruments of transfer, but without liability to see the application of the purchase money and without obligation to enquire into the necessity expediency or authority of any such sale which sale shall be a perpetual bar, both in law and equity against the trustees and each of them and their successors and assigns or the successors and assigns of either of them and against the railway company and against all persons claiming under them or either of them.

Article tenth. It is hereby expressly declared and agreed that the parties of the second part, or their successors in the said trust, shall, out of the proceeds of any sale made under the provisions of
179 this indenture, whether by judicial proceedings or otherwise in enforcement of the security afforded by these presents in the first place pay and retain all costs and expenses attending such sale and all counsel fees and other expenses incurred by them or either of them, in reference to the same, and receive and retain a reasonable compensation for their own services in the premises and also any balance which may be due to them or either of them on account of any disbursements or expenses paid or incurred in or about the care and management of the said premises subsequent to the taking possession thereof by them, or either of them, including the reasonable compensation of any agent or agents who may be employed in or about such care and management, and the rest of the proceeds of such sale or so much thereof as may be necessary, shall be applied to the payment of the whole amount of principal and interest which shall then be due and unpaid upon the bonds secured hereby, or any of them, whether the said principal by

the tenor of the said bonds, be then due or yet to become due; and in case of a deficiency in such proceeds to pay in full the whole amount of principal and interest owing or unpaid upon the said bonds, they shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, and without discrimination as between principal and interest and without preference of the holder of any one bond or coupon over any of the others; and any surplus which may remain after the full payment of the principal and interest of all the said bonds shall be paid over to the said party of the first part, or its successors or assigns, upon lawful demand being made therefor.

Article eleventh. It is expressly agreed by the railway company that in case of a retaking by the trustees or trustee of any of
180 the equipment or rolling stock at any time furnished for the use of the railway company hereunder or substituted for any so furnished, or in case the trustees or trustee shall demand the possession of the same under any of the agreements herein contained, then the railway company will without cost or charge to the trustees or trustee or to those beneficially interested in the trust hereby created, cause every railroad company having the possession or use of any of said property from the railway company to draw forthwith in the usual manner and at the usual speed of freight trains the said equipment and rolling stock to such point or points on the railroad where the same may be as shall be reasonably designated by the trustees or trustee and that the railway company will draw said equipment and rolling stock from any points of connection with other railroads or points on its own railroads where the same may be to such point or points on any of its own railroads as shall be reasonably designated by the trustees or trustee and that the trustees or trustee shall have the right without expense to them or it, to keep and store said equipment and rolling stock upon any of the railroads or premises of the railway company until sold, as provided herein, and until a reasonable time for removal thereof, or until removed by the trustees or trustee without sale.

Article twelfth. The railway company further agrees that in case of any default on its part hereunder all the earnings of the said equipment and rolling stock at any time furnished for the use of the railway company by the trustees or trustee as herein provided or substituted for any so furnished shall then and thereafter be payable to the trustees or trustee and be applied by them or it as if received for the use thereof after a retaking under the provisions hereof and the railway company agrees forthwith upon the
181 said default to give notice to the Railroad Clearinghouse Association and any railroad companies which at the time shall hold or owe any moneys for the service or use of the said equipment or rolling stock to pay over all such moneys to the trustees or trustee and hereby authorizes the trustees or trustee to receive the same and to give such notice with like effect as if given by the railway company; it is agreed however that such notice shall not be necessary

to enable the trustees or trustee to collect and receive such earning in case of any such default.

Article fourteenth. The railway company agrees that in case of any default upon its part hereunder, it will not set up claim or seek to take advantage of any present or future valuation, stay, appraisment, redemption or extension law or laws which might prevent, hinder or delay the exercise by the trustees or trustee of the right to retake possession of any of the equipment or rolling stock mentioned or described herein, or covered hereby or to operate, use, lease or otherwise contract with regard to the use of the same, or to sell any of the property covered hereby or described herein, or which might prevent or delay the immediate enforcement or foreclosure of this indenture or the absolute sale and delivery of any of said property under any proceedings for the purpose, but hereby irrevocably waives the benefits of all such laws, and also hereby irrevocably waives all rights, to have any of the property covered hereby or described herein marshalled upon any foreclosure sale thereof, and consents that the same be sold either as a whole or in such lots or amounts as may be determined by the trustees or trustee or by any court of competent jurisdiction in which foreclosure proceedings with respect to such property may be pending.

182 Article fifteenth. It is agreed between the parties hereto that at any sale of the equipment and rolling stock hereinbefore mentioned or at any sale of the premises or property herein conveyed to the trustees or trustee whether made by the trustees or trustee or by judicial authority, the trustees or trustee may bid for and purchase any of the property so sold, or cause the same to be bid for and purchase-, and that in the event of the purchase of any of said property by the trustees or trustee the right and title thereto shall vest in said trustee or trustees and any bond holder or bondholders may bid for and purchase any of the property so sold at any sale thereof.

Article sixteenth. In case of any such sale as is herein authorized being made of the mortgaged premises and property, or of the equipment of the lien hereby created in the course of judicial proceedings or otherwise the purchaser or purchasers at such sale shall be entitled in making settlement for and payment of the purchase money bidden at such sale to turn in or use towards the payment of such purchase money the bonds and coupons held by such purchaser or purchasers to or towards the payment whereof of the net proceeds of such sale shall be legally applicable reckoning such bonds and coupons or the amounts so turned in or used of the same for such purpose, at such sum as would be payable out of the net-proceeds of such sale to such purchaser or purchasers as holder or holders of such bonds or coupons for his or their just share or proportion of such net proceeds of sale upon due apportionment of and concerning such net proceeds. If the net proceeds of such sale be sufficient to extinguish such bonds and coupons so turned in or used they shall

be cancelled by the person or persons making the sale; and
183 if such net proceeds shall suffice to make a partial payment only of such bonds and coupons due endorsement shall be made upon the same of the amount realized on account thereof, and said bonds and coupons so endorsed shall be returned to the holders.

Article seventeenth. It is expressly agreed by and between the parties hereto that all the costs, charges and legal or other expenses necessary or incident to the acquiring by, or conveying or transfer to the trust company of any equipment or rolling stock under the provisions hereof shall be paid by the railway company and that until all the payments provided for in this indenture and in the bonds issued hereunder shall have been fully made by the railway company and all the agreements on its part hereunder shall have been kept and performed the title to the equipment and rolling stock acquired by means of the bonds issued hereunder in accordance with the provisions hereof shall not pass to or vest in the railway company nor shall the railway company have any right in respect to said equipment and rolling stock except that of using the same as provided in this indenture.

Article eighteenth. While there shall be no existing default in the payment of the principal or interest of any of the said bonds secured hereby or in the performance of any of the matters and things hereby required to be done or performed by the railway company the railway company shall have the right to sell, lease and otherwise dispose of free from the lien of this mortgage or deed of trust any real or personal property conveyed to the trustees or trustee in this indenture which may no longer be required by the railway company for the purpose of its incorporation and the trustees or trustee shall have full power thereupon to release from the lien of this mortgage or deed of trust any property so sold, leased or otherwise disposed of.

184 Any property which may be required for use in substitution for any so released or conveyed to them or it by the railway company, its successors or assigns upon the trusts of these presents. The affidavit of the president or other proper officer of the railway company to the effect that the property so sold, leased, or disposed of is no longer required by the railway company for the purposes of its incorporation shall be sufficient evidence to the trustees or trustee of this fact, and the trustees or trustee shall not be liable to any persons or person by reason of any act done or performed under the provisions of this article in good faith.

Article nineteenth. Said party of the first part for itself its successors and assigns, doth hereby covenant grant and agree to and with the said parties of the second part and their successors in the trust and to and with the respective persons and corporations who or which shall at any time become holders of the said bonds hereby secured or any of them, that the said party of the first part its successors and assigns shall and will at any time and from time to time hereafter upon request, make do execute and deliver all such further

and other acts, deeds and things as shall be reasonably advised, devised or required to effectuate the intention of these presents and to assure and confirm to the said parties of the second part or their successors all and singular the property and estate real and personal, hereinbefore described and hereby intended to be granted and so as to render the same and especially such portions thereof as shall be hereafter acquired by the said party of the first part or its successors available for the security and satisfaction of the said bonds according to the intent and purpose herein expressed.

185 Article twentieth. If the party of the first part or its successors or assigns shall well and truly pay, or cause to be paid to the holders of the said bonds and coupons the principal and interest moneys secured hereby when and as the same shall become due and payable according to the terms provisions, conditions, tenor and effect of the said bonds and coupons then these presents and the estate hereby granted to the trustee or trustees shall cease, determine and be null and void, and the parties of the second part and their successors, agree that in that event all of the said equipment and rolling stock then owned and held by them under the provisions of this indenture shall forthwith become the property of the railway company and the parties of the second part or their successors shall thereupon execute and deliver such proper instrument or instauments as shall be necessary to convey said equipment and rolling stock to the railway company and release the same from all liens created by this deed of trust or mortgage.

Article twenty-first. It is expressly covenanted agreed and declared by and between the parties hereto that the parties of the second part accept the trusts conferred upon them by these presents upon the understanding that they said parties of the second part and their successors in trust, shall not nor shall either of them be liable or accountable for the acts, default or negligence of any agent, agents or attorney who may be appointed by them or either of them under or by virtue of or for the purposes of these presents to do any of the matters or things herein provided for if such agent or agents or attorney be selected with reasonable care: nor shall either or any trustee hereunder be liable or accountable for any mis-conduct, negligence or default of any other trustee hereunder; nor shall said parties of the second part, or their successors in the trust, incur any liability or

186 responsibility whatever in consequence of allowing the railway company or any railroad company under it through lease, contract or otherwise, to have or retain possession or use of the said equipment and rolling stock at any time furnished for the use of the railway company by the parties of the second part or their successors in the trust as herein provided: and that the parties of the second part and their successors in the trust shall not be liable for any destruction, deterioration, loss or damage to any of the property covered hereby or mentioned herein, or for anything whatsoever in connection with this trust except willful mis-

conduct or gross negligence; and that the parties of the second part and their successors in the trust shall not be personally liable for any debts contracted by them for damages to persons or property carried or injured or for salaries or non-fullfilment of contracts during any period while it or they shall manage the trust property or premises upon entry as aforesaid, but that such debts and liabilities shall be and constitute a first and paramount charge upon the trust funds and property and in case the parties of the second part or their successors shall retake possession of any of the property covered hereby or mentioned herein and shall use or operate the same as herein provided in addition to such indemnity as may be required under the terms hereof from the person or persons requesting them to do so, they shall be indemnified out of the moneys and property which shall come into their hands for all claims and demands against them.

Article twenty-second. The trustees under this mortgage or either of them and their successors in the trust may at any time resign the trust hereby created by giving notice of such resignations
187 in writing to the party of the first part or its successors, any vacancy in the office of trustees or trustee hereunder whether created by resignation or otherwise may be permanently filled by the appointment of new trustees or a new trustee by an instrument or concurrent instrument in writing executed under the hands and seals of the holders of a majority in interest of the bonds secured hereby and then outstanding, of their attorneys in fact thereunto duly authorized; but the board of directors of the party of the first part or its successors may make a temporary appointment to fill such vacancy until a permanent appointment shall be made in the manner above provided. Any new trustees or new trustee appointed as aforesaid whether by a permanent or temporary appointment shall upon its, his or their appointment and without any other act, deed or conveyance become and be vested with all the estates trusts, rights, powers and duties of the trustees or trustee in whose place it, he or they shall have been appointed; but nevertheless the respective parties hereto and their successors and assigns shall and will upon request, make execute and deliver all such releases, conveyances, and assurances as shall be appropriate to vest in and confirm and assure to such new trustees or new trustee such estates, trusts, rights, powers and duties according to the intent above expressed.

The trustees or trustee under this indenture shall receive just compensation for all services which they or either of them may render in connection with the trust, to be paid by the railway company or out of the trust estate.

Article twenty-third. It is mutually agreed that the term or words the trustee or the trustees or the said trustee or the said trustees as used in this indenture shall be held and construed to mean
188 the trustees or trustee for the time being, whether original or new, and that all the covenants, stipulations, promises and

agreements herein contained by or on behalf of the party of the first part hereto shall be and are binding upon its successors and assigns whether so expressed or not.

The parties of the second part hereby accept the trusts conferred upon them by these presents.

In witness whereof the said Louisville, New Albany and Chicago Railway Company the said party of the first part has caused these presents to be signed by its president and sealed with its corporate seal and attested by its secretary; and to testify their acceptance of the trusts hereby created the said Central Trust Company of New York has caused this instrument to be signed in its behalf by its vice-president, sealed with its corporate seal and attested by its secretary and the said James Murdock has hereunto affixed his hand and seal the day and year first above written.

LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY,
By SAMUEL THOMAS, *President.*

Attest:
[SEAL.] W. H. LEWIS, *Secretary.*

CENTRAL TRUST COMPANY OF NEW YORK,
By E. FRANCIS HYDE, *Second Vice-President.*

Attest:
[SEAL.] C. H. P. BABCOCK, *Secretary.*

JAMES MURDOCK. [SEAL.]

189 STATE OF NEW YORK, } ss:
County of New York, }

Be it remembered that on this 6th. day of September, A. D. 1894 before me a notary public residing in said State and Kings county personally appeared Samuel Thomas, president of the Louisville, New Albany and Chicago Railway Company, personally known to me to be the real person whose name is subscribed to the foregoing instrument, and acknowledged the- he, on behalf of said railway company and by authority of its board of directors had signed and delivered said instrument as the free and voluntary act of the said railway company for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and affixed my official seal this 6th. day of September, 1894.

[SEAL.] JAMES J. MURPHY,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

STATE OF ILLINOIS, }
County of Cook, } ss:

Be it remembered that on this 8th. day of September, A. D. 1894 before me, a notary public, residing in said State and county, personally appeared W. H. Lewis secretary of Louisville, New Albany and Chicago Railway Company personally known to me to be such secretary and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he on behalf of said railway company and by authority of its board of directors had signed the said instrument and affixed thereto the official corporate seal of said railway company as the free and voluntary act of the said Louisville, New Albany and Chicago
190 Railway Company for the uses and purposes therein set forth: that he knew the corporate seal of said company and that the seal so affixed is said corporate seal.

In witness whereof I have hereunto set my hand and affixed my official seal this 8th day of September, 1894.

[SEAL.]

CHAS. E. BRYNE,
Notary Public.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 13th. day of September, A. D. 1894 before me, a notary public residing in said State, city and county, personally appeared E. Francis Hyde 2d. vice-president of the Central Trust Company of New York, personally known to me to be the 2d vice-president of the said company and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he, on behalf of the said trust company, and by authority of its board of trustees had executed the said instrument as the free and voluntary act of the said trust company for the uses and purposes therein set forth.

Also personally appeared before me at the same time C. H. P. Babcock secretary of the said trust company personally known to me to be such secretary and personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged that he on behalf of the said trust company and by like authority had signed the said instrument and affixed thereto the official corporate seal of said trust company as the free and voluntary act of said trust company for the uses and purposes therein set forth; that he knew the corporate seal of said
191 trust company and that the seal so affixed is said corporate seal.

In witness whereof I have hereunto set my hand and affixed my official seal this 13th day of September, 1894.

[SEAL.]

FRANK B. SMIDT,
Notary Public, 289, N. Y. Co.

STATE OF OHIO, }
County of Allen, } ss:

Be it remembered that on this 11th. day of September, 1894 before me a notary public residing in said State and county personally appeared James Murdock, personally known to me to be the real person whose name is subscribed to the foregoing instrument and acknowledged the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th. day of September, 1894.

[SEAL.] JAS. W. HALFHILL,
Notary Public, Allen County, Ohio.

Recorded Oct. 2", 1894 at 2 p. m.
B. A. VOGEL, *R. W. Co.*

192 *Decree of Foreclosure.*

Plaintiff offered in evidence a decree of foreclosure in the United States court in the case of "The Farmers' Loan and Trust Company and John H. Barker *vs.* The Louisville, New Albany and Chicago Railway Company, and others. (Identified by the reporter as Exhibit F.)

Defendant objected to the introduction of this decree of foreclosure in evidence, on the ground, first: that the owner of these lands is not made a party to the suit; second: these lands are not described in the decree, and the decree is insufficient to establish title to these lands in the plaintiff. The court overruled the objection, to which ruling of the court the defendants at the time, excepted. The said decree of foreclosure being then read and given in evidence, was in the words and figures following, to-wit:

EXHIBIT F.

Circuit Court of the United States, District of Indiana.

THE FARMERS' LOAN AND TRUST COMPANY and JOHN H. Barker, Complainants,
against
THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY Company and Others, Defendants. } No. 9401.

Consolidated cause.

(Copy.)

193 *Decree of Foreclosure and Sale.*

TURNER, McCLURE & ROLSTON,
22 *William Street, New York City, Solicitors for Complainants The Farmers' Loan and Trust Company and John H. Barker.*
BUTLER, NOTMAN, JOLINE & MYNDERSE,
54 *Wall Street, New York City, and*
FLOYD A. WOODS, *Indianapolis, Ind., Solicitors for Complainants Central Trust Company of New York, John H. Stotsenburg, and James Murdock.*

At a regular term of the circuit court of the United States for the district of Indiana, held at the court rooms, at the city of Indianapolis, on the 23d day of January, 1897.

Present: Hon. William A. Woods, circuit judge.

THE FARMERS' LOAN AND TRUST COMPANY and John H. Barker, Complainants,
vs.
THE LOUISVILLE, NEW ALBANY AND CHICAGO Railway Company and Others, Defendants. } No. 9401. Chancery.

194 This consolidated cause came on to be heard at this term upon the bill of complaint of the complainants The Farmers' Loan and Trust Company and John H. Barker, and the amended and supplemental bill of complaint of said complainants The Central Trust Company of New York and John H. Stotsenburg, and upon the bill — complaint of the complainants Central Trust Company of New York and James Murdock, and upon the exhibits to said several bills and upon the answers of the defendants thereto, and upon the several orders, papers and proceedings in this cause, and was

argued by counsel, and thereupon, upon consideration thereof, it was found by the court that all and singular the material allegations of the bills are true as therein alleged and the equity of this cause is with the complainants in said several bills; and it was ordered, adjudged and decreed, that the mortgage set forth in the bill of complaint herein of the complainants The Farmers' Loan and Trust Company and John H. Barker made by the defendant The Louisville New Albany and Chicago Railway Company to said complainants, and bearing date the first day of January, 1886, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises which are described in said mortgage as follows (the words "party of the first part" being used to designate the said defendant Louisville, New Albany and Chicago Railway Company):

"All the railway of the party of the first part in the city of Louisville, in the State of Kentucky, and extending from New Albany, on the Ohio river, to Michigan City in the State of Indiana, and from the city of Chicago, in the State of Illinois, to the Indiana State line, under leasehold right, and from said State line to the city of Indianapolis, in the State of Indiana, including the railway lying and being in all of said cities, and terminal rights and facili-
195 ties and approaches thereto, the same being about four hundred and seventy-five miles in length, and running through the counties of Floyd, Clark, Washington, Orange, Lawrence, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in said State of Indiana, and Jefferson county in said State of Kentucky, and Cook county in said State of Illinois, and also all branches thereof, including all the property of every sort or nature now owned by said railway company, and all that it may in the future acquire for the purposes and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, piers, wharves, structures, erections, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood, and supplies of every kind, belonging or appertaining to the railway company, also all the tolls, incomes, issues and profits out of the said property, and all rights to receive and recover the same, also all estate, right, title and interest of the party of the first part, in and to any and all real estate belonging to the said party of the first part, also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents, that the said railway company shall and doth convey to the said trustees, all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or

description the same may be, at the date of these presents owned or possessed by the said railway company, or which may at any
196 time hereafter during the continuance of this trust be acquired by the said railway company for purposes connected with or appertaining to the railroads or railways above mentioned or described; and also all choses in action, of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind or description, real, personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways; all of which it is hereby covenanted shall inure by way of accretion to the benefit and advantage of said trustees, and by way of further and better security."

That said mortgage also constitutes a first lien upon 9,999 shares of the capital stock of the Chicago and Western Indiana Railroad Company, of the par value of $100 each; 2,399 shares of the capital stock of the Belt Railway Company, of Chicago, of the par value of $100 each; 11,990 shares of the capital stock of the Bedford and Bloomfield Company, of the par value of $50 each; and 2,990 shares of the Orleans, West Baden and French Lick Springs Railway Company, of the par value of $100 each; all which said corporate shares have been deposited with and are held by The Farmers' Loan and Trust Company, one of said complainants, as trustee under the said mortgage of January 1st, 1886, under and by virtue of a certain collateral trust agreement dated May 18, 1866, whereby said
197 corporate shares are deposited and pledged as further security for the bonds issued under the said mortgage of January 1st, 1886.

It was also further ordered, adjudged and decreed that the lien of said mortgage dated January 1st, 1886, is subsequent and subsidiary to the liens of two other prior mortgages made by said defendant railway company; namely, a mortgage dated July 1st, 1880, made to John C. New and Washington C. De Pauw, as trustees, covering a portion of the above-described premises, and a mortgage dated August 10th, 1881, made to John C. New, as trustee, covering another portion of the above-described premises; but the lien of the said mortgage dated January 1st, 1886, made to said complainants herein as aforesaid, is prior to any other lien upon the property of said defendant railway company in favor of any party to this cause, except as herein stated.

It was also further ordered, adjudged and decreed that, as further security for the bonds secured by said mortgage dated January 1st, 1886, the defendant The Orleans, West Baden and French Lick Springs Railway Company (the said corporation whose stock was

owned by the defendant Louisville, New Albany and Chicago Railway Company and was expressly pledged as further security, as aforesaid, for the bonds issued under said mortgage of January 1st, 1886), on or about December 12th. 1896. made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust to said complainants as trustees of and under said mortgage of January 1st, 1886, and therein and thereby granted and conveyed to said complainants, as such trustees, all the railways of said Orleans, West Baden and French Lick Springs Railway Company from French Lick to Orleans, Orange county, about 17 miles in length, all being in the State of Indiana, together with all lands, rights of way, tracks, lines, rails, bridges, ways buildings,
198 structures, fences, fixtures, franchises, privileges and rights of the said Orleans, West Baden and French Lick Spring Railway Company, of every kind and nature whatsoever, it being in said conveyance covenanted that said premises and property should inure by way of benefit and advantage to said trustees, and by way of better and additional security for the payment of bonds issued under said mortgage dated January 1st, 1886; and that thereby all the said property included in said conveyance of December 12th, 1896, became and was and now is part and parcel of the property covered by said mortgage of January 1st, 1886.

It was also further ordered, adjudged and decreed, that as further security for the bonds secured by said mortgage dated January 1st, 1886, the defendant The Bedford and Bloomfield Railroad Company (the said corporation whose stock — owned by the defendant Louisville, New Albany and Chicago Railway Company and was expressly pledged as further security as aforesaid, for the bonds issued under said mortgage of January 1, 1886), on or about December 12th, 1896, made and duly executed a certain instrument in writing in the way of a confirmatory mortgage or deed of trust to said complainants as trustees of and under said mortgage of January 1st, 1886, and therein and thereby granted and conveyed unto said complainants as such trustees all the railway of the said Bedford and Bloomfield Railroad Company from Switz City in Green county, to Bedford in Lawrence county, about 41 miles in length, all being in the State of Indiana, together with all the lands, rights of way, track, lines, rails, bridges, ways, buildings, structures, fences, fixtures, franchises and privileges and rights of said Bedford and Bloomfield Railroad Company of every kind and nature whatsoever, it being expressly covenanted that said premises and property should inure by way of bene-
199 fit and advantage to said trustees, and by way of better and additional security for the payment of the bonds issued under said mortgage dated January 1st, 1886; and that thereby all the said property included in said last-mentioned conveyance of December 12th, 1896 became and was and now is part and parcel of the property covered by said mortgage dated January 1st, 1886.

It was also further ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage

dated January 1st, 1886, 4,700 of the bonds mentioned and described therein for $1,000 each, aggregating $4,700,000 of principal, together with coupons for interest thereunto appertaining, and that default was made in the payment of interest due upon said mortgage on the 1st day of October, 1896.

It was also further ordered, adjudged and decreed that the mortgage set forth in the bill of complaint herein of the complainants The Central Trust Company of New York and John H. Stotsenburg, made by the defendant Louisville, New Albany and Chicago Railway Company to said complainants bearing date May 1st, 1890, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises described in said mortgages as follows (the words "party of the first part" and "railway company," in said description, being used to designate the defendant Louisville, New Albany and Chicago Railway Co.):

"All the present and in future to be acquired railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises now owned or at any time hereafter to be acquired by it, being more particularly described as follows:

All the present line of railway extending from New Albany,
200 Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield railroad, extending from Bedford to Switz City, in Indiana, and also its other proprietary and owned line of railroad, called the Orleans, West Baden and French Lick Springs railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal facilities in the city of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana, and also all its leasehold and contract rights, trackage and terminal facilities vested in the party of the first part by virtue of its certain written contract with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company, and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the city of New Albany, Indiana, and the city of Louisville, Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it being about five hundred and twelve miles in length, and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe,

White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone,
201 Clinton, Carroll, Jasper, Newton, and Lake, in the State of Indiana, and Cook county, in the State of Illinois, and Jefferson county, in the State of Kentucky; and also all other railroads, extensions and branch lines which the railway company, party of the first part, may at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the State of Indiana, or in any other State, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company and all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned or hereafter to be constructed or acquired, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway company, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tolls, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all the estate, right, title and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected it being the true intent and meaning of these presents that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all
202 manner of personal property, of whatever nature or description the same may be, at the date of these presents owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company for purpose- connected with or appertaining to the railroads or railways above mentioned or described, or intended to be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the State of Indiana; and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in anywise referring or relating to the property or franchise hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real personal or mixed, and wherever the same may be situate, that may, at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purpose- connected with or appertain-

ing to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall enure, by way of accretion, to the benefit and advantage of said trustees and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein and conveyed hereby."

203 That said mortgage also constitutes a lien upon said shares of stock deposited with and held by said Farmers' Loan and Trust Company under and by virtue of said agreement dated May 18th, 1886, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker, as trustees under said mortgage dated January 1st, 1886; and that the lien of said mortgage of May 1st, 1890, upon all of said property, is subsequent and subordinate only to the lien of said mortgage of January 1st, 1886, and to the liens of said prior mortgages hereinbefore mentioned upon the properties covered by said prior mortgages respectively.

It was also ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage dated May 1st, 1890, 2,800 of the bonds mentioned and described therein for $1,000 each, aggregating $2,800,000 of principal, together with coupons for interest thereto annexed, and that default was made in the payment of interest due upon said mortgage on the 1st day of November, 1896.

It was also ordered, adjudged and decreed that the mortgage set forth in the bill of complaint herein of the complainants The Central Trust Company of New York and James Murdock, made by the defendant Louisville, New Albany and Chicago Railway Company to said complainants, and bearing date the 1st day of September, 1894, is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises described in said mortgage as follows (the words "party of the first part" and "railway company," in said description, being used to designate the defendant Louisville, New Albany and Chicago Railway Company).

"All the railway system and property of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and

204 franchises thereunto appertaining, being more particularly described as follows: All the present line of railway extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois, and also its proprietary and owned line of railroad, called the Bedford and Bloomfield railroad, extending from Bedford to Switz City, in Indiana, and also its other proprietary and

owned line of railroad, called the Orleans, West Baden and French Lick Springs railroad, extending from Orleans to French Lick, Indiana, and also all its lands, station buildings, tracks and terminal facilities in the city of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana and also all its leasehold and contract rights, trackage and terminal facilities vested in the party of the first part by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company, and the Louisville Bridge Company, whereby the trains and traffic of the said party of the first part are moved and handled between the city of New Albany, Indiana, and the city of Louisville, Kentucky, the before mentioned system of railroads owned by the said party of the first part and exclusive of tracks leased and operated by it, being about five hundred and twelve miles in length, and situate in the counties of
205 Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake, in the S-ate of Indiana, and Cook county, in the State of Illinois, and Jefferson county, in the State of Kentucky; including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company for the purpose of and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls fixtures, franchises, privileges and rights of the railway company, and also all the locomotives, engines, tenders, cars carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company; also all the tools, incomes, issues and profits, arising out of the said property and its operation, and all rights to receive and recover the same, also all the estate, right, title, and interest of the party of the first part in and to any and all real estate belonging to said party of the first part; also all leasehold lands, with the buildings thereon erected, it being the true intent and meaning of these presents that the said railway company party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate, all and all manner of real estate or interest therein, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, at the

date of these presents owned or possessed by the said railway company, whether within or without the State of Indiana;
206 and also all choses in action of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories, and documents in anywise referring or relating to the property or franchises hereby conveyed; and also all franchises and property and all personal rights or interest in any franchises or property of every kind and description, real personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, hereby conveyed, all of which it is hereby covenanted shall enure, by way of accretion, to the benefit and advantage of said trustees, and by way of further and better security for the bonds to be issued hereunder; it being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns, as fully and to the same extent as if all such property were specifically described herein and conveyed hereby."

That the said mortgage also constitutes a lien upon said shares of stock deposited with and held by said Farmers' Loan and Trust Company under and by virtue of said agreement dated May 18th, 1886, subject only to the lien of said Farmers' Loan and Trust Company and said John H. Barker as trustees under said mortgage dated January 1st, 1886, and to the lien of said Central Trust Company of New York and said John H. Stotsenburg as trustees under said mortgage dated May 1st, 1890; and that the lien of said mortgage dated September 1st, 1894, upon all of said property above
207 mentioned and described is subsequent and subordinate only to the lien of said mortgage dated January —, and to the liens of said prior mortgages above mentioned upon the properties covered by said prior mortgages respectively.

That said mortgage dated September 1st, 1894, also includes and embraces certain other property consisting of five certain parcels of railroad equipment, that is to say:

1. 300 box cars built by the Haskell & Barker Car Company, costing $140,010.

2. 250 flat cars built by the Haskell & Barker Car Company, costing $96,250.

3. 200 coal cars and 50 stock cars built by the Haskell & Barker Car Company, costing $102,750.

4. 300 box cars and 250 flat cars built by Oliver Adams agent, costing $293,224.

5. 1,000 flat cars built by the Haskell & Barker Car Company, costing $370,000.

All of said equipment included in said five parcels being marked

"Owned by Central Trust Company of New York, Louisville, New Albany and Chicago equipment mortgage."

And that said mortgage dated September 1st, 1894, is a first lien upon said railroad equipment, and prior to any other lien thereon in favor of any party to this cause.

It was also further ordered, adjudged and decreed, that the premises and property covered by said mortgage, dated January 1st, 1886, and said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, are the same and identical with the exception that said mortgage dated January 1st, 1886 covers
208 property not covered by said other mortgages, and consisting of the right, title and interest of said Orleans, West Baden, and French Lick Springs Railway Company, conveyed and mortgaged by said companies to the complainants Farmers' Loan and Trust Company and John H. Barker, as trustees, by said conveyances dated December 12, 1896; and with the exception that said mortgage dated September 1st. 1894, covers and is a first lien on said five parcels of railroad equipment, and said other mortgages only cover and embrace the right, title and interest of the defendant Louisville, New Albany and Chicago Railway Company in and to said five parcels of railroad equipment, subject to the lien of said mortgage dated September 1st, 1894.

It was also ordered, adjudged and decreed that there have been issued and are now outstanding and secured by said mortgage dated September 1st, 1894, 709 of the bonds mentioned and described therein for $1,000 each, aggregating $709,000 of principal, together with coupons for interest thereunto appertaining and that default was made in the payment of interest due upon said mortgage on December 1st, 1896.

It was also ordered, adjudged and decreed that the amount due upon said bonds secured by said mortgage dated January 1st, 1886, which is in default and which is now due and payable, is as follows:

Interest due October 1st, 1886	$141,000.00
Interest thereon to the date of this decree	2,638.06
Total	$143,638.06

That the amount to become due upon the said bonds secured by said mortgage dated January 1st, 1886, and which is unpaid, is $4,700,000 with interest at six per cent. per annum from October 1st, 1896.

That the amount due upon said bonds secured by said mortgage dated May 1st, 1890 which is in default and which is now
209 due and payable is as follows:

Interest due November 1st, 1896	$70,000.00
Interest thereon to date of this decree	959.68
Total	$70,959.68

That the amount due upon the said bonds secured by said mortgage dated May 1st, 1890, and which is unpaid, is $2,800,000 with interest at five per cent. per annum from November 1st, 1896.

That the amount due upon the said bonds secured by said mortgage dated September 1st, 1894, which is in default, and which is now due and payable, is as follows:

Interest due December 1st, 1896	$17,725.00
Interest thereon to the date of this decree	154.38
Total	$17,879.38

That the amount to become due upon the said bonds secured by said mortgage dated September 1st, 1894, and which is unpaid, is $709,000 with interest at five per cent. per annum from December 1st, 1896.

It was also ordered, adjudged and decreed that the defendant Louisville, New Albany and Chicago Railway Company shall within ten days after the entry of this decree pay or cause to be paid to the complainants the Farmers' Loan and Trust Company and John H. Barker, or to the clerk of this court, for the use and benefit of the holders of the outstanding bonds secured by said mortgage dated January 1st, 1886, and of the unpaid interest warrants or coupons appertaining thereto, the sum of $143,638.06 in gold coin of the United States of America, with interest thereon from the date of entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant, and secured by
210 said mortgage dated January 1st, 1886; and that within the same time the defendant Louisville New Albany and Chicago Railway Company pay or cause to be paid to the complainants Central Trust Company of New York and John H. Stotsenburg, or to the clerk of this court, for the use and benefit of the holders of the outstanding bonds of said defendants secured by said mortgage dated May 1st, 1890, and of the unpaid interest warrants or coupons appertaining thereto, the sum of $70,595.68 in gold coin of the United States of America, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant and secured by said mortgage dated May 1st, 1890; and that within the same time the defendant Louisville, New Albany and Chicago Railway Company pay, or cause to be paid, to the complainants Central Trust Company of New York and James Murdock, or to the clerk of this court, for the use and benefit of the holders of the outstanding bonds of said defendant secured by said mortgage dated September 1st, 1894, and of the unpaid interest warrants of coupons appertaining thereto, the sum of $17,879.38 in gold coin of the United States of America, with interest thereon from the date of the entry of this decree to the date of payment, being the sum adjudged to be due and payable by said defendant and secured by said mortgage dated September 1st, 1894.

It was also ordered, adjudged and decreed that, unless the said payment, as hereinbefore directed with respect to said bonds secured by said mortgage dated January 1st, 1886, shall be made within the time directed as aforesaid, said mortgage be foreclosed, and all property, rights and interest conveyed thereby, and upon which said mortgage is a lien, as the said property is hereinbefore particularly described, be sold as hereinafter directed, and that under and
211 by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through and under the said defendants, or represented by any of the parties to this suit, (except the interest of the Central Trust Company of New York and James Murdock, as trustees under said mortgage dated September 1, 1894, in and to said five parcels of railroad equipment hereinbefore mentioned and described) of, in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be included in the said mortgage, be foreclosed, and cut off and forever barred; that unless the said payment, as hereinbefore directed with respect to said bonds secured by said mortgage, dated May 1st, 1890, shall be made within the time directed as aforesaid, the said mortgage be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage is a lien, as the said property is hereinbefore particularly described, and including all material and supplies on hand at the time of the sale purchased or held by the receiver, be sold as is hereinafter directed, and that under and by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through or under them, or represented by any of the parties to this suit (except the interest of the Farmers' Loan and Trust Company and John H. Barker, as trustees under said mortgage dated January 1st, 1886, and excepting the interest of the Central Trust Company of New York and James Murdock, as trustees under said mortgage dated September 1, 1894, in and to said five parcels of railroad equipment hereinbefore mentioned and described), of, in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof, embraced or included, or intended to be included, in the said mortgage, be foreclosed and cut off and forever barred; that, unless the said payment as hereinbefore directed
212 with respect to said bonds secured by said mortgage dated September 1st, 1894, shall be made within the time directed as aforesaid, the said mortgage be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage is a lien as the said property is hereinbefore particularly described, be sold as hereinafter directed, and that under and by said sale all equity of redemption of the defendants and of any and all persons claiming by, through or under them or represented by any of the parties to this suit (excepting the interests of the Farmers' Loan and Trust Company, and John H. Barker, as trustees under said mortgages, dated January 1st, 1886, and of the Central Trust Company of New York and John H. Stotsenburg, as trustees under said mort-

gages, dated May 1st, 1890, in and to that portion of the property covered by said mortgage dated September 1st, 1894, upon which said mortgages dated respectively January 1st, 1896, and May 1st, 1890 are prior liens as hereinbefore adjudged), of, in and to said mortgaged premises property rights, and franchises and every part and parcel thereof embraced or included, or intended to be included in the said mortgage, be foreclosed and cut off and forever barred. That the foreclosures above directed shall not nor shall either or any of them affect the prior liens of said mortgages hereinbefor*d* mentioned made by said Louisville New Albany and Chicago Railway Company, the one dated July 1st, 1880, and made to John C. New and and Washington C. De Pauw, as trustees, and the other dated August 10th, 1881, and made to John C. New as trustees.

It was also adjudged and decreed that the railway properties covered by said respective mortgages constitute one railroad system and cannot be sold in separate parcels without injury, to the rights of the creditors and of the parties in interest.

It was also ordered, adjudged and decreed that the property covered by said mortgage dated January 1st, 1886, and the prop-
213 erty covered by said mortgage dated May 1st. 1890, and the property covered by said mortgage dated September 1st, 1894, shall, subject to the provisions aforesaid, and in default of the payment of the sums hereinbefore found to be due and directed to be paid, be sold without valuation, appraisement, or redemption at public auction to the highest bidder or bidders on the mortgage premises at the round house of the defendant railway company near the Belt Line junction in the city of Indianapolis, Indiana, on a day and at an hour to be fixed by the special master herein appointed in his advertisement of sale, such day and hour to be fixed in accordance with the request of the solicitors for the complainants, named in the bills filed herein for the foreclosure of said respective mortgages, and previous notice of the time place and terms of said sale shall be given by publication of a brief general advertisement referring to this decree for further particulars and for a more specific description of the property herein ordered to be sold, which advertisement shall be published at least once in each week for the terms of four weeks preceding the date of the sale in four newspapers of general circulation, one published in New Albany, Indiana; one in Indianapolis, Indiana; one in Chicago, Illinois, and one in the city of New York. The said special master may, at the request of the compa*l*inants named in the bills filed herein for the foreclosure of said several mortgages, or at the request of the solicitors for such complainants, adjourn or postpone said sale, and may without further notice proceed with said sale on any day to which the said sale may have been thus adjourned. The special master may give such further notice of sale in addition to the notice before described as he may think proper or as the said complainant may request. The complainants or any bondholder or bondholders may bid and purchase at said sale.

It was also ordered, adjudged and decreed that the said
214 sale shall be conducted as follows, that is to say: Said special master shall first offer for sale, separately and in one parcel, the property which is covered by said mortgage dated January 1st, 1886, as hereinbefore, found and decreed (upon which said property said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, are subsequent liens), the same being all the property hereinbefore mentioned and described, excepting only said five parcels of railroad equipment, but including said shares of capital stock deposited with said Farmers' Loan and Trust Company and the said property conveyed to said Farmers' Loan and Trust Company by said Orleans, West Baden and French Lick Springs Railway Company and said Bedford and Bloomfield Railroad Company. Said special master shall next offer for sale, separately and in one parcel, the property which is covered by said mortgage dated September 1st, 1894, and upon which said mortgage is a first lien, the same being said five parcels of railroad equipment hereinbefore mentioned and described. In making such sale the said special master shall accept no bid for the property so to be first offered for sale (being all the property hereinbefore described, except said five parcels of railroad equipment) for a sum less than $2,500,000, nor from any bidder who shall not place in his hands or deposit with him, at the time of making the bid, as a pledge that such bidder will make good his bid, if accepted by the court, the sum of $25,000 in money or certified check. In making such sale the said special master shall accept no bid for the said five parcels of railroad equipment from any bidder for a sum less than $500,000, nor from any bidder who shall not place in his hands or deposit with him at the time of making the bid as a pledge that such bidder will make good his
215 bid if accepted by the court, the sum of $5,000 in money or certified check. After having offered said property separately as hereinbefore provided, said special master shall then offer for sale the entire property covered by said mortgage dated January 1st, 1886, and said mortgage dated May 1st, 1890, and said mortgage dated September 1st, 1894, including said five parcels of railroad equipment, as one parcel without valuation, appraisement or redemption, and if the highest bid received by him for the same shall exceed the aggregate amount of the highest bids for the two parcels when offered separately, then the whole shall be struck off and sold as an entirety to the person making such bid for the whole, and the proceeds of sale shall be divided into two parts in proportion to the amounts bid separately on said properties and distributed in the same manner as if said property had been sold separately. Said special master shall accept no bid for the property as an entirety from any bidder for a sum less than $3,000,000, nor from any bidder who shall not place in his hands or deposit with him at the time of making the bid as a pledge that such a bidder will make good his bid if accepted by the court, the sum of $30,000 in money or certified check.

It was also ordered, adjudged and decreed, that of the price for which said property shall be sold there shall be paid in cash at the time of sale the cash deposit or deposits hereinbefore required, which shall be received as a part of the purchase price, and also at the same time, and from time to time thereafter, such further portions of said purchase price shall be paid in cash as the court may direct in order to meet the expense of this suit and the suits consolidated herein, and such receiver's indebtedness as shall have matured prior to the confirmation of sale herein, and to pay such claim, if any, against
the mortgaged property as the court may adjudge to be prior
216 in equity to the said mortgages. All sums of money received by said special master shall be paid by him into the registry of the court. The court reserves the right to reject any bid and to resell said premises and property upon the failure of any purchaser for twenty days to comply with any order of the court requiring payment. The balance of the purchase price not required to be paid in cash may either be paid in cash or the purchaser may satisfy and make good said balance of his bid, in whole or any part, by paying over and surrendering outstanding bonds and overdue coupons appertaining thereto, secured by said mortgage, dated January 1st, 1886, or outstanding bonds and overdue coupons appertaining thereto, secured by said mortgage, dated May 1st, 1890, or outstanding bonds and overdue coupons appertaining thereto, secured by said mortgage, dated September 1st, 1894, said bonds and coupons being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash. All bonds and coupons that may be used to make such payment shall be surrendered to the special master and cancelled if the whole amount due thereon is applied upon the purchase price; but if less than the whole amount is applied, then the amount so applied shall be stamped or written upon said bonds and coupons which shall be returned to the holder. The foregoing provisions shall be applicable whether the said properties be sold in separate parcels or as an entirety. As soon as any sale or sales shall have been made by the special master in pursuance of this decree he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed. If any bid shall be
accepted by the court, and the person making the same shall
217 fail to comply — all the conditions of sale and all orders of the court in respect thereto, the sum deposited by the bidder shall be forfeited and shall be applied as the court may direct.

It was also ordered, adjudged and decreed that the purchaser or purchasers of any parcel at such sale shall, as part of the consideration for such sale, and in addition to the price bid, take the property purchased upon the express condition that he or they, or his or their assigns approved by the court will notwithstanding pay off and satisfy any and all receiver's indebtedness which shall not be

paid by the receiver herein out of the income and earnings of the mortgaged property, or which shall not be paid out of the proceeds of sale as hereinafter directed; and also any and all claims heretofore filed, or which may hereafter be filed within a period to be limited by an order of this court, in this cause or either of the causes consolidated herein in respect of the parcel so purchased, but only when and as the court shall allow such claims and adjudge the same to be prior in lien to the mortgages foreclosed in this suit or either of them, and shall determine the parcel in respect of which such claims shall be payable, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto; and the purchaser or purchasers or their approved assigns shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the rights in respect to such appeals which the complainants herein or any of them would have in case such appeals had been taken by them. The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers or his or their assigns approved by the court as aforesaid, to comply with any order of the court in respect to the payments of receiver's indebtedness or prior lien claims within
218 thirty days after the service of a certified copy of such order upon said purchaser or purchasers or his or their assigns.

It was also ordered, adjudged and decreed, that the fund or funds from the sale or sales of the properties above mentioned shall be applied as follows and in the following order, to wit:

First. To the payment of the costs of this suit and of the suits consolidated herein and of the ancillary suits brought in the circuit court of the United States for the northern district of Illinois by the same parties who are complainants herein, including all proper expenses of the sale herein ordered and such compensation as may be awarded by the court to said special master for making said sale, and the compensation of the complainants The Farmers' Loan and Trust Company and John H. Barker and the complainants Central Trust Company of New York and John H. Stotsenburg and James Murdock for their services, charges and expenses in the execution of their respective trusts, to be fixed and allowed by the court, and such proper allowances as the court may take for the fees and disbursements of the solicitors and counsel of said complainants, respectively, and next to the payment of such compensation as may be allowed to the receiver appointed in the suits consolidated herein and to the payment of any indebtedness of said receiver which has not been or shall not be paid out of the earnings and income of the property coming into the hands of said receiver, and which shall have matured and become payable at the time of the confirmation of sale herein. The above mentioned payments shall be apportioned between the funds received from such sale or sales and applicable respectively to the payment of said bonds secured by said several mortgages in such proportions as the court shall direct.

219 Second. The remainder of the fund derived from the sale of the property first to be offered for sale as hereinbefore directed being all the property hereinbefore described, except said five parcels of railroad equipments, shall be applied (1st) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgages, dated January 1st, 1886, without preference of interest over principal or principal over interest: (2d) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgage, dated May 1st, 1890, without preference of interest over principal or principal over interest; and (3d) to the payment ratably of the interest due and unpaid and of the principal unpaid upon said bonds secured by said mortgage, dated September 1st, 1894, without preference of interest over principal or principal over interest.

Third. The remainder of the fund derived from the sale of that portion of the property upon which said mortgage, dated September 1st, 1894, is a first lien as hereinbefore adjudged, the same being said five parcels of railroad equipment, shall be applied to the payment ratably of the interest due and unpaid, and of the principal unpaid upon said bonds secured by said mortgage, dated September 1st, 1894, without preference of interest over principal or principal over interest.

Should there be any surplus remaining after making the payments directed in this subdivision third, the same shall be added to the fund derived from the sale of the property other than said five parcels of railroad equipment, and shall be applied as directed in subdivision second above.

220 Fourth. Should there be any surplus after making the payments above directed, the same shall remain in the registry of the court to abide such order or decree as the court may make in respect thereto.

It was also ordered, adjudged and decreed, that William A. Van Buren be, and he is hereby, appointed special master to execute this decree, and, upon confirmation of the sale or sales hereby ordered and full compliance with the terms of sale by the purchaser or purchasers, to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold; and, upon the request of the purchaser or purchasers, and exhibition of the special master's deed or deeds, the receiver, having possession of the property sold, shall make, execute and deliver to the said purchaser or purchasers good and sufficient deeds of conveyance or evidence of transfer of any and all property sold which is vested in or standing in the name of said receiver, or to which said receiver has in any manner acquired title, and shall surrender to the purchaser or purchasers possession of the property sold; and, upon confirmation of said sale or sales and full compliance with the terms of sale by the purchaser or purchasers, he or they shall be entitled to a deed or deeds of assurance to be executed according to law by the defendant Louisville, New Albany and Chicago Railway Company, and the complainants The

Farmers' Loan and Trust Company and John H. Barker and The Central Trust Company of New York and John H. Stotsenburg and James Murdock.

The court reserves the right in term time or at chambers to appoint another person special master with like powers in case of the death or disability to act of the special master hereby designated, or in case of his resignation or failure to act or removal by the court.

It was also ordered, adjudged and decreed that the pur-
221 chaser or purchasers of the property herein decreed to be sold shall be invested with, and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, or so much thereof as shall be purchased by him or them, and all the rights, privileges and franchises appertaining thereto as fully and completely as the said Louisville, New Albany and Chicago Railway Company now holds and enjoys, or has heretofore held or enjoyed the same: and further, that the said purchaser or purchasers shall have and be entitled to hold the said railroads and property freed and discharged of, and from liens of the mortgages foreclosed in this suit and from the claims of the parties to this suit, or any of them.

It was also ordered, adjudged and decreed, that in case there should be any deficiency in payments of the amounts hereinbefore required and directed to be paid so that said amounts shall not be paid in full then said special master shall report to the court the amount of such deficiency, and the complainants as trustees of said mortgages respectively shall have judgement against the said defendant Louisville, New Albany and Chicago Railway Company for the amounts due, and shall have execution therefor pursuant to the rules and practice of this court.

It was also ordered, adjudged and decreed that all questions not hereby disposed of and determined be reserved for future adjudication, the settlement of the same being held not to be necessary for the purpose of this decree, and the court reserves the right to make such further orders at the foot of this decree as may seem just and proper. And the court reserves full power to adjudge with respect to the income of the receivership and the rights of creditors in and to the same.

222 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States, within and for said district, do hereby certify that the above and foregoing is a full and true copy of the decree of said court in the cause of The Farmers' Loan and Trust Company *et al. vs.* The Louisville, New Albany and Chicago Railway Company *et al.*, made and entered on the 23rd day of January, 1897, as fully as the same appears upon the records now in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 28" day of April, A. D. 1898.

[SEAL.] NOBLE C. BUTLER, *Clerk.*

DISTRICT OF INDIANA:

I, John H. Baker, judge of the district court of the United States, for said district, do certify that at the date of the foregoing certificate, Noble C. Butler was, and now is, the clerk of the circuit court of the United States for said district, and that his attestations aforesaid is in due form of law.

Witness my hand this 28" day of April, 1898.

[SEAL.] JOHN H. BAKER, *Judge.*

223 *Special Master's Report of Sale.*

Plaintiff offered in evidence special master's final report of sale in the case referred to in the last preceding decree. (Identified by the reporter as Exhibit G.)

Defendant- objected to the introduction of the special master's final report of sale, for the reason that there is nothing so far authorizing any sale or report of sale of the lands in controversy, and no persons having interest in these lands were made parties, or affected thereby.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted, and the said special master's final report of sale being then read and given in evidence, was in the words and figures following, to-wit:

EXHIBIT G.

Circuit Court of the United States, District of Indiana.

THE FARMERS' LOAN AND TRUST COMPANY and John H. Barker
vs.
THE LOUISVILLE, NEW ALBANY AND CHICAGO Railway Company *et al.*
No. 9401. Chancery.

Consolidated cause.

Special Master's Final Report.

I, William A. Van Buren, heretofore appointed special master under certain final decrees of foreclosure and sale entered by the circuit court of the United States for the district of Indiana and the circuit court of the United States for the northern district of Illinois

in the suits therein pending under the above title, respectfully reports to the court:—

224 That Fredrick P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, have fully complied with the terms of sale as rendered in and by said decrees and by the order of confirmation made and entered in the district of Indiana on March 10, 1897, and in the northern district of Illinois on March 12, 1897.

That the said purchasers have paid the entire balance of the purchase price of the properties sold to them, to-wit, the sum of $2,971,000; that they have made such payment in part by delivering to me outstanding bonds with all coupons appertaining and attached thereto overdue and not due secured by the mortgage made to the Farmers' Loan and Trust Company and John H. Barker, as trustees, dated January 1, 1886, to the number of 4591, and outstanding bonds with all coupons appertaining and attached thereto overdue and not due secured by a mortgage to the Central Trust Company of New York and James Murdock, trustees, dated September 1, 1894, to the number of 706, said bonds and coupons being received at such price or value as were equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash.

That the price or value of each of said six per cent bonds so received, with coupons appertaining thereto maturing October 1, 1896, and thereafter, is the sum of $531,235.17.

That the price or value of each of said bonds secured by the mortgage of September 1, 1894, so received with coupons appertaining thereto maturing December 1, 1896, and thereafter is the sum of $704.3174.

Of the said bonds dated January 1, 1896, those bearing the numbers following were not delivered to me, to-wit: 53, 72, 77, 237, 238, 239, 240, 241, 243, 244, 245, 273, 302, 303, 352, 353, 360, 361,
225 362, 430, 493, 496, 530, 544, 598, 599, 600, 751, 753, 780, 781, 800, 806, 816, 818, 865, 945, 947, 960, 1040, 1041, 1042, 1043, 1044, 1113, 1132, 1169, 1170, 1171, 1172, 1173, 1269, 1272, 1301, 1448, 1449, 1450, 1451, 1452, 1549, 1611, 1683, 1719, 1760, 1761, 1770, 1771, 1772, 2142, 2510, 2527, 2528, 2529, 2546, 2584, 2626, 2631, 2761, 2778, 2813, 2814, 2834, 2835, 2956, 3082, 3115, 3116, 3117, 3505, 3563, 3835, 3909, 3920, 3977, 4034, 4035, 4036, 4037, 4038, 4489, 4496, 4497, 4500, 4519, 4520, 4521, 4596, 4618.

And of the said bonds dated September 1, 1894, those bearing the numbers following were not delivered to me, to-wit: 172, 173, 174.

That the said purchasers have paid to me in cash the further sum of $34,851.26, making the entire amount of the purchase price, and I have paid the sum into the registry of this court.

That I have made, executed and delivered to the said purchasers a deed of the property sold as in and by said decrees required.

I annex hereto a schedule marked "A" showing the method of ascertainment of the dividend value of each outstanding bond secured by said mortgage of January 1, 1886, and September 1, 1894, respectively.

All of which is respectfully submitted.

WILLIAM A. VAN BUREN,
Special Master.

226

SCHEDULE "A."

Total bid		$3,001,000
Less—		
Clerk's fees in Indiana	576.65	
Docket fee	20.	
Clerk's fees in Illinois	105.	
Special master's compensation	3,500.	
Expenses of advertising	631.95	
	4,833.60	
Balance to be distributed	2,996,166.40	
		3,001,000

By the terms of the decree this balance is to be divided between the consolidated six per cent. bonds and the equipment bonds in proportion to the amounts bid, separately on the parcels offered for sale.

$2,500,000 having been bidden for the railroad and $500,000 for the equipment, the consolidated six per cent. bonds are entitled to 5/6 of the balance and the equipment bonds to 1/6 thereof.

5/6 of $2,996,166.40 equal $2,496,805.33.

4700 consolidated bonds each entitled to $531.23517;

1/6 of $2,996,166.40, $499.361.067.

709 equipment bonds each entitled to $704.3174.

The purchasers paid into court at the time of sale	30,000.
They delivered to me 4591 consolidated 6's at $531.23517 each	2,438,900.66
And 706 equipment bonds at $704.3174 each	497,248.08
They paid me in cash March 18, 1897	34,851.26
	$3,001,000.

Dated March 19, 1897,

W. A. VAN BUREN,
Special Master.

227 Circuit Court of the United States, District of Indiana.

THE FARMERS' LOAN AND TRUST COMPANY and JOHN H. BARKER, Complainants,
vs.
THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY Company *et al.*, Defendants.
} No. 4901.

Consolidated cause.

Supplemental Report of Special Master.

I, William Van Buren, heretofore appointed special master under certain final decrees of foreclosure and sale, entered by the circuit court of the United States for the district of Indiana and the circuit court of the United States for the northern district of Illinois, in the suits therein pending under the above title, in addition to and supplemental to my final report heretofore on the 30th day of March, 1897, filed with this court, respectfully report that upon the face of each of the 4,591 bonds and overdue coupons thereto attached, dated January first, 1886, delivered to me, as in my final report set forth, I did stamp and set forth that said bond with coupons was received by me from said purchaser at a price or value of $531,23517; and upon the face of each of the 706 bonds and overdue coupons thereto attached, dated September first, 1894, delivered to me as in my said final report set forth, I did stamp and set forth that said bonds with coupons *was* received by me from said purchasers at a price or value of $704,3174. And after so stamping said bonds I deposited the same, subject to my order and control, in the vaults of the Central Trust Company of New York, at No. 54 Wall street, New York.

228 Respectfully submitted.

W. A. VAN BUREN,
Special Master.

Dated at Indianapolis, April 9, 1897.

In the Circuit Court of the United States for the District of Indiana, November Term, 1896, April 9, 1897.

Before the Honorable William A. Woods, Judge.

THE FARMERS' LOAN AND TRUST COMPANY and JOHN H. BARKER, Complainants,
vs.
THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY and Others, Defendants.

Consolidated cause.

Entry of Approval of Special Master's Final Report.

Comes now William A. Van Buren, heretofore appointed special master under certain final decrees of foreclosure and sale entered by the circuit court of the United States for the district of Indiana and the circuit court of the United States for the northern district of Illinois, in the suits therein pending under the above title, and by his final report filed March 30, 1897, and by his supplemental report filed April 9, 1897, which reports are in the words and figures following; (here insert) shows the payment by Frederick P. Olcott, Henry W. Poor and Henry C. Rouse as a committee of bondholders of the Louisville, New Albany & Chicago Railway Company of the money bid by them at the sale made by the said special master on the 10th day of March, 1897, the compliance by said purchasers with the terms of their bid, and the making and delivery to them by
229 the said special master of a deed to the property so purchased by them at said sale, and the court having seen and examined said reports does in all things approve and confirm the same.

District of Indiana.

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true and complete copy of the report of the special master filed in said court on the 30th day of March, 1897, and of the supplemental report of the special master filed in said court on the 9th day of April 1897, and of the order of court made and entered in said court on the 9th day of April, 1897, all in the cause of the Farmers' Loan and Trust Company *et al. vs.* The Louisville, New Albany and Chicago Railway Company *et al.* as fully as the same remain on file and appears of record in my office.

Witness my hand and the seal of said court, this 10th day of April 1897.

[SEAL.]

NOBLE C. BUTLER, *Clerk.*

District of Indiana.

I, John H. Baker, judge of the district court of the United States, for said district, do certify that at the date of the foregoing certificate, Noble C. Butler was, and now is, the clerk of the circuit court of the United States, for said district, and that his attestations aforesaid is in due form of law.

Witness my hand, this 10th day of April 1897.

JOHN H. BAKER, *Judge.*

230 *Special Master's Deed.*

Plaintiff offered in evidence a certified copy of the special master's deed in the foreclosure case just preceding the offering of this evidence. (Identified by the reporter as Exhibit H.)

Defendants objected to the introduction of the special master's deed, because there is nothing introduced authorizing the execution of any such deed; there is nothing in the deed describing or conveying or purporting to convey the property in controversy.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted. And the said special master's deed being then read and given in evidence was in the words and figures following, to-wit:

EXHIBIT "H."

Special Master's Deed.

This indenture, made this nineteenth day of March, A. D. 1897, by and between William A. Van Buren, as special master, party of the first part, and Frederic P. Olcott, Henry W. Poor, and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, parties of the second part, witnesseth:

Whereas, a certain decree was rendered and entered in the circuit court of the United States for the district of Indiana, on the 23rd day of January, 1897 in a certain cause then pending in said court entitled The Farmers' Loan and Trust Company and John H. Barker, complainants, against The Louisville, New Albany and Chicago Railway Company and others, defendants (consolidated cause), and a certain other decree was rendered and entered in the circuit
231 court of the United States for the northern district of Illinois, on the 27th day of January, 1897, in a certain cause therein pending between the same parties; and

Whereas, in and by said decree it was adjudged that in default of the payment of the sums therein found to be due, and directed to be paid at the time and in the manner therein directed, the property

described in said decrees should be sold as provided and ordered in and by said decrees, and that under and by said sale all equity of redemption of the defendants in the suit above mentioned, and of any and all persons claiming by, through or under them, or represented by any of the parties to said suits, of, in and to the mortgaged premises, property, rights, franchises, and every part and parcel thereof, embraced or included, or intended to be included, in the several mortgages foreclosed in said suits, except as in said decrees otherwise specifically provided, be foreclosed and cut off and forever barred; and

Whereas, the said defendant The Louisville, New Albany and Chicago Railway Company wholly failed to pay the sums of money set forth and found to be due and adjudged to be paid in and by said decrees within the time ordered, or other wise, and thereupon William A. Van Buren, the special master named in said decrees, gave due notice of the time, place and terms of said sale in accordance with the provisions and directions of said decrees and pursuant to said decrees, and *to* the time and place specified in said notice, said special master offered for sale at public auction to the highest bidder or bidders, first in two separate parcels as required by said decrees, and then as an entirety and in one parcel, without valuation, appraisement or redemption, the entire property directed
232 by said decrees to be sold and described in the said notice of sale, and thereupon sold and struck off the entire property in one parcel to Frederic P. Olcott, Henry W. Poor and Henry C. Rouse as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, they being the highest bidders therefor, for the sum of three million and one thousand dollars, and said last mentioned bid exceeded the aggregate of the highest bids for the two parcels offered separately as aforesaid; and

Whereas, the said special master duly reported said sale to the court and filed his report of sale on the 10th day of March, 1897; and

Whereas, on the 10th day of March 1897, a decree was made by the circuit court of the United States for the district of Indiana, in the suit above mentioned therein pending and thereafter a decree was also made by the circuit court of the United States for the northern district of Illinois in said suit pending therein, confirming said special master's report of sale and ratifying, approving and confirming said sale and making the same absolute; and the said purchasers having fully complied with the terms of said decrees and orders and with all the conditions of sale and the orders of court with respect thereto, and having paid the purchase price as provided in said decrees;

Now, therefore, in consideration of the premises, and for the purpose of giving full effect to said sale, and in execution of the orders and decrees of said courts above set forth, and in consideration of the payment of the purchase price by the said purchasers, and in accordance with such decrees, the said William A. Van Buren, as

special master as aforesaid, has, granted, sold and conveyed,
233 and, by these presents, doth grant, sell and convey unto Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, all and singular the property directed to be sold in and by said decrees of foreclosure and sale and therein described, namely;

All the railway system and property of every kind and nature formerly of the Louisville, New Albany and Chicago Railway Company, together with all the equipment, appurtenances and franchises thereunto appertaining, being more particularly described as follows: All the lines of railway formerly belonging to and operated by the Louisville, New Albany and Chicago Railway Company, extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois, and also all the lands, station buildings, tracks and terminal facilities formerly of the Louisville, New Albany and Chicago Railway Company, in the city of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights, and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana, and also all its leasehold and contract rights, trackage and terminal facilities formerly vested in said Lousiville, New Albany and Chicago Railway Company by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company and the
234 Louisville Bridge Company, whereby the trains and traffic of the said Louisville, New Albany and Chicago Railway Company were moved and handled bet-een the city of New Albany, Indiana, and the city of Louisville, Kentucky; also all the railway formerly of the Bedford and Bloomfield Railroad Company extending from Switz City, in Greene county, Indiana, to Bedford, in Lawrence county, Indiana, about forty-one miles in length, all being in the State of Indiana; also all the railway formerly of the Orleans, West Baden and French Lick Springs Railway Company extending from French Lick to Orleans, Orange county, about seventeen miles in length, all being in the State of Indiana; the before mentioned systems of railroads, exclusive of tracks leased and operated under lease or contract, being about five hundred and twelve (512) miles in length and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton and Lake in the State of Indiana, and in Cook county in the State of Illinois and Jefferson

county in the State of Kentucky; including and conveying by these presents all the property of every sort or nature, real personal and mixed, heretofore owned by said several and respective railway or railroad companies for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways, buildings shops, tanks, piers wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of said railway and railroad companies and each of them, and also all locomotives, engines, tenders, cars. carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of
235 every kind belonging or appertaining to said companies or any or either of them; also all estate, right, title and interest of said railroad or railway companies and each of them in and to any and all real estate; and all leasehold lands, with buildings thereon erected; and all and all manner of franchises of said railroad and railway companies of every kind and description, however derived and wheresoever situate, and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, which at the time of the entry of the decrees aforesaid was owned or possessed by said railway and railroad companies and each of them, whether within or without the State of Indiana, and also all choses in action and contract rights of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchises hereby conveyed; also nine thousand nine hundred and ninety-nine shares of the capital stock of the Chicago and Western Indiana Railroad Company of the par value of one hundred dollars each; two thousand three hundred and ninety-nine shares of the capital stock of the Belt Railway Company of Chicago of the par value of one hundred dollars each; eleven thousand nine hundred and ninety shares of capital stock of the Bedford and Bloomfield Railroad Company of the par value of fifty dollars each; and two thousand nine hundred and ninety shares of the Orleans West Baden and French Lick Springs Railway Company of the par value of one hundred dollars each. Also five certain parcels of railroad equipment, that is to say: (1) 300 box cars built by the Haskell & Barker Car Company, costing $140,010; (2) 250 flat cars built by the Haskell & Barker Car
236 Company, costing $96,250; (3) 200 coal cars and 50 stock cars built by the Haskell & Barker Car Company, costing $102,750; (4) 300 box cars and 250 flat cars built by Oliver Adams, agent, costing $293,224; (5) 1,000 flat cars built by the Haskell & Barker Car Company, costing $370,000; all of said equipment included in said five parcels, being marked "Owned by the Central Trust Company of New York, trustee, Louisville, New Albany and Chicago Railway Company equipment mortgage."

To have and to hold the same unto said Frederic P. Olcott, Henry W. Poor, and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company their heirs, executors, administrators, successors and assigns forever; subject, nevertheless, to the terms, provisions and conditions contained in said decrees of foreclosure and sale.

In witness whereof, the said William A. Van Buren, as special master, has hereunto set his hand and seal the day and year first above written.

WILLIAM A. VAN BUREN, [L. S.]
Special Master.

In presence of (on page 5 the words "and contract rights" interlined before execution)

ADRIAN H. JOLINE.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered, that on this 18th day of March, A. D. 1897, before me, a notary public, duly commissioned and qualified, personally appeared William A. Van Buren, special master, the grantor in the foregoing deed, and acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and
237 affixed my official seal the day and year aforesaid.

LELAND S. STILLMAN,
[L. S.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

Recorded March 31, 1897, at 1¾ o'clock p. m.

238 STATE OF INDIANA, }
Marion County, } ss:

RECORDER'S OFFICE.

I, William E. Shilling, recorder for said county, do hereby certify that the above and foregoing is a true and complete copy of the record of the special master's deed William A. Van Buren, special master to Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders L. N. A. & Chi. Ry. Co. as the asame now appears of record in the recorder's office of Marion county, in the State of Indiana, in Deed Record No. 294 at page 7.

In witness whereof, I have hereunto set my hand and official seal, at Indianapolis, this 5th day of November 1897.

[SEAL.] W. E. SHILLING,
Recorder of Marion County, Indiana.

Deed of Olcott and Others.

Plaintiff offered in evidence a certified copy of the deed of Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bond holders, to the plaintiff in this case, (Identified by the reporter as Exhibit I.)

Defendants objected to the introduction of this deed, because there is nothing in the proceedings introduced in evidence vesting any title to the lands in controversy in Frederic P. Olcott, the grantor, or tending in any way to support the issues in this case.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

239–240 And the said deed of Olcott *et al.* being then read and given in evidence was in the words and figured following, to-wit:

EXHIBIT "I."

This indenture, made this 31st day of March, A. D. 1897, by and between Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, parties of the first part, and the Chicago, Indianapolis and Louisville Railway Company, a corporation created and existing under the laws of the State of Indiana, party of the second part.

Whereas, at a certain sale made on the 10th day of March, 1897, by William A. Van Buren, special master, the parties hereto of the first part became the purchasers of the railroads and property formerly belonging to the Louisville, New Albany and Chicago Railway Company and hereinafter described, said sale being made in pursuance of decrees of foreclosure and sale duly entered of record by the circuit court of the United States for the district of Indiana, and the circuit court of the United States for the northern district of Illinois, in suits pending in said courts entitled "The Farmers' Loan and Trust Company, and John H. Barker, complainants, against The Louisville, New Albany and Chicago Railway Company and others, defendants, consolidated cause;" and

Whereas, in order to carry into effect said sale, and pursuant to the decree of said courts, said William A. Van Buren as special master, granted sold and conveyed to the parties hereto of the first part all and singular the property so purchased at said sale by deed of conveyance bearing date the nineteenth day of March, 1897, to which reference is hereby made for further particulars; and

241 Whereas, the said Louisville, New Albany and Chicago Railway Company, and the Bedford and Bloomfield Railroad Company, and the Orleans, West Baden and French Lick Springs Railway Company have, by way of confirmation of title, duly ex-

ecuted, signed, sealed and delivered a deed of further assurance in confirmation of their purchase so made as aforesaid, conveying and releasing unto the said parties of the first part all the interest of said corporations in and to the lines of railroad, property, equipment, appurtenances and franchises so sold and conveyed by the special master as aforesaid; and

Whereas, William H. McDoel, the receiver in said suits, as thereto required by the decrees and orders of said courts, has made, executed and delivered unto the said parties of the first part *of* a deed of conveyance or transfer of all property so sold which is vested in or standing in the name of said receiver, or to which said receiver had in any manner acquired title, including all materials and supplies on hand at the time of said sale purchased or held by said receiver; and

Whereas, the parties of the first part have created and constituted the party of the second part a corporation under the name of Chicago, Indianapolis and Louisville Railway Company, under and in pursuance of the provisions of an act of the General Assembly of the State of Indiana, approved March 3, 1865, entitled "An act to authorize, regulate and confirm the sale of railroads, to enable the purchasers of the same to form corporations, and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same;" and
242 a certain act supplemental thereto, approved December 20, 1865; and

Whereas, the said party of the second part was created and organized as a corporation as aforesaid for the purpose of carrying out the designs and purposes of the parties of the first part in making such purchase, and to own, possess and enjoy all and singular said railroads, property, privileges, immunities and franchises so purchased by and conveyed to and vested in the said parties of the first part;

Now therefore, this indenture witnesseth, that the said parties of the first part, for and in consideration of the sum of twenty-three million one hundred and nine thousand dollars, to them paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted sold and conveyed, and by these presents do grant, sell and convey unto the said party of the second part, all the railroads and property purchased by them at the sale aforesaid made on the 10th day of March 1897 and conveyed and transferred to them by said deed made by said William A. Van Buren, as special master, and by said deed made by said The Louisville, New Albany and Chicago Railway Company, The Bedford and Bloomfield Railroad Company and The Orleans, West Baden and French Lick Springs Railway Company and by said deed made by said William H. McDoel, as receiver as aforesaid, the same being more particularly described as follows:

All the railway system and property of every kind and nature

formerly of the Louisville, New Albany and Chicago Railway Company, together with all the equipment, appurtenances and franchises thereunto appertaining, being more particularly de-
243 scribed as follows: All the line of railway formerly belonging to and operated by the Louisville, New Albany and Chicago Railway Company, extending from New Albany, Indiana, to Michigan City, in the same State, and also from Indianapolis, Indiana to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois, and also all the lands, station buildings, tracks and terminal facilities formerly of the Louisville, New Albany and Chicago Railway Company in the city of Louisville, Kentucky, and also all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago, in the city of Chicago, or elsewhere in the State of Illinois; and also all its real estate, trackage, leasehold and contract rights and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana; and also all its leasehold and contract rights, trackage and terminal facilities, formerly vested in said Louisville, New Albany and Chicago Railway Company, by virtue of its certain written contracts with the Jeffersonville, Madison and Indianapolis Railroad Company, the Pennsylvania Company and the Louisville Bridge Company, whereby the trains and traffic of the said Louisville, New Albany and Chicago Railway Company were moved and handled between the city of New Albany, Indiana, and the city of Louisville, Kentucky; also, all the railway formerly of the Bedford and Bloomfield Railroad Company extending from Switz City in Green county, Indiana, to Bedford in Lawrence county, Indiana, about forty-one miles in length, all being in the State of Indiana; also all the railway formerly of the Orleans, West Baden and French Lick Springs Railway Company extending from French Lick to Orleans, Orange county, about seven-
244 teen miles in length, all being in the State of Indiana; the before mentioned system of railroads, exclusive of tracks leased and operated under lease or contract, being about five hundred and twelve miles in length and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton, and Lake in the State of Indiana, and in Cook county in the State of Illinois and Jefferson county in the State of Kentucky; including and conveying by these presents all the property of every sort or nature, real, personal and mixed, heretofore owned by said several and respective railway or railroad companies for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described, together with all the lands, tracks, lines, rails, bridges, ways buildings, shops, tanks, piers wharves, structures, erections, turntables, fences, walls fixtures, franchises, privileges and rights of

said railway and railroad companies and each of them, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to said companies or any or either of them; also all estates, right, title and interest of said railroad or railway companies and each of them in and to any and all real estate; and all leas-hold lands, with the buildings thereon erected; and all and all manner of franchises of said railroad or railway companies of every kind and description, however derived and wheresoever situate, and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, which at the time of the entry of the decree aforesaid was owned or possessed by said railway and railroad companies
245 and each of them, whether within or without the State of Indiana, and also all choses in action and contract rights of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in anywise referring or relating to the property or franchises hereby conveyed; also nine thousand nine hundred and ninety-nine shares of the capital stock of the Chicago and Western Indiana Railroad Company of the par value of one hundred dollars each; two thousand three hundred and ninety-nine shares of the capital stock of the Belt Railway Company of Chicago of the par value of one hundred dollars each; eleven thousand nine hundred and ninety shares of the capital stock of the Bedford and Bloomfield Railroad Company of the par value of fifty dollars each; and two thousand nine hundred and ninety shares of the Orleans, West Baden and French Lick Springs Railway Company of the par value of one hundred dollars each. Also five certain parcels of railroad equipment, that is to say; (1) 300 box cars built by the Haskell & Barker Car Company, costing $140,010; (2) 250 flat cars built by the Haskell & Barker Car Company, costing $96,250; (3) 200 coal cars and 50 stock cars built by the Haskell & Barker Car Company, costing $102,750; (4) 300 box cars and 250 flat cars built by Oliver Adams, agent, costing $293,224; (5) 1,000 flat cars built by the Haskell & Barker Car Company, costing $370,000; all of said equipment included in said five parcels being marked "Owned by Central Trust Company of New York, trustee, Louisville, New Albany and Chicago Railway Company equipment mortgage." And also any and all property, of every description whatsoever, which was vested in or standing in the name of said William H. McDoel as receiver, or to which said William H. McDoel as receiver in any manner
246 acquired title including all meterials and supplies on hand at the time of said sale purchased or held by said receiver.

To have and to hold the same unto the said party hereto of the second part, its successors and assigns forever, subject to the terms, provisions and conditions contained in said deed from said William

A. Van Buren, as special master, to said parties of the first part, and to the terms, provisions and conditions contained in the decrees of said courts above mentioned in the suits above mentioned.

In witness whereof, the said Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, have hereunto set their hands and seals the day and year first above written.

F. P. OLCOTT. [——.]
HENRY W. POOR. [——.]
HENRY C. ROUSE. [——.]

Signed sealed and delivered in the presence of
As to Henry W. Poor
FRANCIS L. PATTON.

(As to F. P. Olcott)
HENRY W. CALHOUN.

(As to Henry C. Rouse)
J. H. HILL.

STATE OF NEW YORK,
City and County of New York, } ss:

Before me, the undersigned, a notary public in and for the city and county of New York, duly commissioned and qualified, personally appeared Frederic P. Olcott and Henry W. Poor, two of the grantors in the foregoing deed, and acknowledged the execution of the same.

In witness whereof, I have hereunto set my hand and affixed my official seal this 1st day of April, 1897.

247

[L. S.] LELAND S. STILLMAN,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

THE STATE OF TEXAS,
County of Galveston. }

Before me, the undersigned, a notary public in and for the county and State aforesaid, duly commissioned and qualified, personally appeared Henry C. Rouse, one of the grantors in the foregoing deed, and acknowledged the execution of same.

In witness whereof, I have hereunto set mu hand and affixed my official seal, this 5th day of April. 1897.

[L. S.] M. L. MALEVINSKY,
Notary Public in and for Galveston Co., Texas.

Recorded April 22, 1897, at 3 o'clock p. m.

STATE OF INDIANA, } ss:
Marion County, }

RECORDER'S OFFICE.

I, William E. Schilling, recorder of said county, do hereby certify that the above and foregoing is — true and complete copy of the record of the deed executed by Frederic P. Olcott, *et al.* the committee of bond holders of the L. N. A. & Chi. Co. to the Chicago Indianapolis and Louisville Railway Company as the same now appears of record in the recorder's office of Marion county in the State of Indiana, in Deed Record No. 294 at page 435.

In witness whereof, I have hereunto set my hand and official seal, at Indianapolis, this 10th day of November 1897.

248 W. E. SHILLING,
[SEAL.] *Recorder of Marion County, Indiana.*

Articles of Association of Plaintiff.

Plaintiff offered in evidence a certified copy of the articles of association of the plaintiff railway company. (Identified by the reporter as Exhibit J.)

Defendants objected to the introduction of the articles of association, because they are immaterial, and articles of incorporation do not entitle the plaintiff to, take title to, or ownership over the lands in suit.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

And the said articles of association being then read and given in evidence were in the words and figures following to-wit:

EXHIBIT "J."

UNITED STATES OF AMERICA, }
State of Indiana. }

OFFICE OF THE SECRETARY OF STATE.

I, Union B. Hunt, secretary of state of the State of Indiana, hereby certify that the annexed pages contain a full true and complete copy of the articles of association or agreement in writing of Chicago, Indianapolis and Louisville Railway Company with the several certificates thereon, filed March 25th, 1897, as the same appears on file, as the law directs, in this office.

In testimony whereof, I hereunto set my hand and affix the
249 great seal of the State of Indiana. Done at my office, in the city of Indianapolis, this 8th day of May, A. D. 1889.

UNION B. HUNT,
[SEAL.] *Secretary of State.*

Ten cents revenue stamp.

Articles of Association of the Chicago, Indianapolis and Louisville Railway Company.

These articles of association witness:

That, whereas, on January 23rd, 1897, the circuit court of the United States for the district of Indiana duly allowed and entered of record a final decree in a certain suit in equity pending in the said court, wherein The Farmers' Loan and Trust Company, John H. Barker, Central Trust Company of New York, and others were complainants, and The Louisville New Albany and Chicago Railway Company The Orleans, West Baden and French Lick Springs Railway Company and The Bedford and Bloomfield Railroad Company were defendants, wherein and whereby certain mortgages executed by the said above mentioned railway companies respectively were ordered to be foreclosed and all and singular the property described in said mortgages and decree, including the entire lines of railroad of said mortgagor corporations together with all the equipment, appurtenances, material, supplies, leasehold, estates, franchises and privileges thereunto appertaining were directed to be offered and sold at public auction to the highest bidder by William A. Van Buren, special master, upon the terms and conditions set forth in such decree; and

250 Whereas, a final decree of foreclosure and sale in all respects similar to the above mentioned decree of the circuit court for the district of Indiana was on January 27th, 1897, allowed and entered of record by the circuit court of the United States for the northern district of Illinois in a certain suit therein pending, wherein the said Farmers' Loan and Trust Company John H. Barker and The Central Trust Company of New York and others were complainants, and the said above named Louisville, New Albany and Chicago Railway Company and others were defendants, wherein and whereby the said circuit court of the United States for the northern district of Illinois ordered the sale of all and singular the above mentioned railroad property equipment, appurtenances and franchises by the said William A. Van Buren special master; and

Whereas, the said special master on March 10th, 1897 after having given full notice of such sale by advertisement as required by the said decree in that behalf, did at Indianapolis, Indiana, in all respects in compliance with the said decree and orders of sale, offer at public auction to the highest bidder all and singular the said lines of railway equipment, appurtenances and franchises and other property, situate in the States of Indiana, Illinois and Kentucky described in and by said decrees, and at such sale the undersigned, Frederic P. Olcott, Henry W. Poor and Henry C. Rouse, as a committee of bondholders of the Louisville, New Albany and Chicago Railway Company, bid for all and singular the said described prop-

erties as a unit, in one parcel, the sum of three million and one thousand dollars, which sum was the highest and best bid made at such sale, and thereupon the said above described railroad properties, equipment, appurtenances, franchises and other property,
251 situate in the three States aforesaid, were struck off by said special master to said Olcott, Poor, Rouse, as a committee as aforesaid, as the highest and best bidders therefor at the said above mentioned sum of three million and one thousand dollars; and

Whereas, the said William A. Van Buren, special master, duly reported the said sale to the said circuit court of the United States for the district of Indiana, and also to the circuit court of the United States for the northern district of Illinois, and such sale was in all things approved, ratified and confirmed by said courts; and

Whereas, under the order and decree of said last mentioned courts the said William A. Van Buren, special master, has executed and delivered unto the undersigned a deed of conveyance in writing, reciting the said decrees of foreclosure and the sale made thereunder and the confirmation thereof, and the compliance by the purchasers with the conditions of said decree and the terms of said purchase in so far as to entitle them to the conveyance and possession of all and singular the railroads, property, equipment, appurtenances, stocks and franchises so purchased by them as aforesaid, and thereupon conveying to and vesting in the said Olcott, Poor and Rouse the title to all and singular the railroads, property, equipment appurtenances, stocks and franchises described in the said decrees of foreclosure and sale, the same being more particularly described as the lines of railroad heretofore belonging to and operated by the Louisville, New Albany and Chicago Railway Company and situate in the counties of Floyd, Clark, Washington, Orange, Lawrence, Greene, Monroe, Owen, Putnam, Montgomery, Tippecanoe, White, Pulaski, Starke, Laporte, Marion, Hamilton, Boone, Clinton, Carroll, Jasper, Newton, and Lake in the State of Indiana, and in Cook county, in the State of Illinois, and in Jefferson county, in the State of
252 Kentucky; said lines extending from New Albany, Indiana, to Michigan City in the same State, and also from Indianapolis Indiana, to a point on the State line between Indiana and Illinois, about twenty miles southeast of the city of Chicago, Illinois; including therein the branch line of railroad, called the Bedford and Bloomfield railroad, extending from Bedford to Switz City in Lawrence and Greene counties in Indiana; and also its other branch line of railroad called the Orleans, West Baden and French Lick Springs railway, extending from Orleans to French Lick, in Orange county, Indiana, together with all its rights, interest, proprietary and leasehold estate and terminal facilities in the franchises, property, tracks, and station buildings of the Chicago and Western Indiana Railroad Company, and in the Belt Railway Company of Chicago in the city of Chicago or elsewhere; also all its real estate, trackage, leas-hold and contract rights and terminal properties, stations, sidings and franchises in the city of Indianapolis, Indiana,

and also all its leasehold and contract rights, trackage and terminal facilities vested in the said Louisville, New Albany and Chicago Railway Company, by virtue of its contracts with the Jeffersonville, Madison and Indianapolis Railroad Company and the Pennsylvania Company. The said system of lines of railroad so purchased from and conveyed by the special master being about 512 miles of railroad, including all the property of every sort or nature, real, personal and mixed, owned by the said railway company, or purchased by the receiver of said courts for the purposes of or connected with or pertaining to the said railroads above mentioned, together with all the lands, tracks, lines, rails, bridges, ways, buildings, shops, tanks, piers, wharves, structures, erections, turntables, fences, walls, fixtures, franchises, privileges and rights of the railway com-
253 pany, and also all locomotives, engines, tenders, cars, carriages, tools, machinery, manufactured and unmanufactured materials, coal, wood and supplies of every kind belonging or appertaining to the railway company, or in the custody of the receiver of the said courts at the time of the said sale, together with all the other property, rights, books, accounts, title deeds, franchises and privileges in and by said decrees of foreclosure and sale more specifically described, reference being thereto had; and

Whereas, the said Louisville, New Albany and Chicago Railway Company, and the said Bedford and Bloomfield Company and the said Orleans, West Baden and French Lick Springs Railway Company as thereto ordered and required by the decrees and orders of said courts have by way of confirmation of title duly executed, signed, sealed and delivered unto the said Olcott, Poor and Rouse, a deed of further assurances and confirmation of their purchase so made as aforesaid, conveying and releasing unto the said purchasers under said decrees of foreclosure all the interests of said corporation in and to the lines of railroad, property, equipment, appurtenances and franchises so sold and conveyed by the special master as aforesaid; and

Whereas, William H. McDoel, the receiver in said suits, as thereunto required by the decree*d* and orders of said courts, has made, executed and delivered unto said Olcott, Poor and Rouse a deed of conveyance or transfer of all property so sold which was vested in or standing in the name of said receiver or to which said receiver had in any manner acquired title, including all materials and supplies on hand at the time of said sale purchased or held by said receiver; and

Whereas, the said purchasers under such decrees of foreclosure and sale have in all things complied with the terms of said
254 decrees and made all the payments and performed all the conditions required of them by their said purchase, and the said courts have ordered the receiver of said property to deliver possession of all and singular the property so purchased by the undersigned at such foreclosure sale, and the undersigned are now in full

possession thereof as such purchasers, grantees of said special master and owners;

Now, therefore, for the purpose of carrying out the design and purposes of the undersigned in making such purchase and of creating and organizing a corporation under the laws of the State of Indiana, to own, possess and enjoy all and singular said railroads, property, privileges, immunities and franchises so purchased by, conveyed to and vested in the said purchasers, the undersigned do hereby associate themselves together and do hereby create and constitute a corporation under the provisions of an act of the General Assembly of the State of Indiana, approved, March 3rd, 1865, entitled "An act to authorize, regulate and confirm the sale of railroads, to enable the purchasers of the same to form corporations, and to exercise corporate powers, and to define their rights, powers and privileges; to enable such corporations to purchase and construct connecting and branch roads, and to operate and maintain the same" and a certain act supplemental thereto, approved December 20th, 1865, and such purchasers and associates do hereby, as authorized by the said statutes, agree and declare as follows:

First. They hereby form and constitute themselves and their associates and successors into a corporation which shall exist in perpetuity and be called the "Chicago, Indianapolis and Louisville Railway Company."

Second. On the filing of these articles of association and in-
255 corporation in the office of the secretary of state of Indiana, the said corporation to be called the "Chicago, Indianapolis and Louisville Railway Company" shall be thereupon constituted a corporation of said State and shall be thereupon vested with full title to all of said lines of railroad, properties, appurtenances, equipments and franchises so as aforesaid purchased by and conveyed to the undersigned to be thenceforth held, operated and enjoyed as the exclusive property of said corporation to be hereby created.

Third. Said corporation hereby created shall also have, exercise and enjoy with reference to the said railroad and property so to be vested in it all and singular the powers, privileges, rights, immunities and franchises in respect to said lines of railroad as completely in every respect as the same were held, exercised and enjoyed by the Louisville, New Albany and Chicago Railway Company, and the Orleans, West Baden and French Lick Springs Railway Company and the Bedford and Bloomfield Railroad Company under their original charters and amendments thereto. The said corporation shall also have, exercise and enjoy all and singular the powers, privileges, franchises and immunities granted and allowed by the aforesaid mentioned act of March 3rd, 1865, and the said supplemental act of December 20th, 1865, and all other general laws of the State of Indiana now in existence or hereafter to be enacted vesting powers and privileges in railway companies of such State.

Fourth. The capital stock of the corporation to be hereby formed shall be and is hereby fixed at the sum of fifteen millions, five hun-

dred thousand dollars ($15,500,000), with privilege of such increase hereafter as may be allowed by law. The said stock shall be divided into five million (5,000,000) or preferred stock, consisting of fifty thousand shares of one hundred dollars ($100.) each, and ten
256 millions, five hundred thousand dollars ($10,500,000) of common stock, consisting of one hundred and five thousand shares of one hundred dollars ($100) each.

Fifth. The property and business of the corporation hereby formed shall be managed by a board of directors which shall consist of eleven (11) persons.

The names and residences of the persons who shall constitute the first board of directors are as follows:

Samuel Thomas, New York city, N. Y.
Calvin S. Brice, Lima, Ohio.
John Greenough, New York city, N. Y.
John G. Moore, New York city, N. Y.
Edward R. Thomas, New York city, N. Y.
William H. McDoel, Chicago, Ills.
Gilbert G. Shaw, Chicago, Ills.
James Murdock, Lafayette, Ind.
Crawford Fairbanks, Terre Haute, Ind.
Volney T. Malott, Indianapolis, Ind.
E. C. Field, Chicago, Ills.

They shall continue in office until the third Wednesday of September, 1897.

In witness whereof, the said associates and incorporators have hereunto set their hands and seals this 25th day of March, 1897.

F. P. OLCOTT. [SEAL.]
HENRY W. POOR. [SEAL.]

In presence of
(As to Henry W. Poor)
FRANCIS L. PATTON, JR.

(As to F. P. Olcott)
FRANCIS L. PATTON, JR.

(As to Henry C. Rouse)
FRANCIS L. PATTORN, JR.

257 STATE OF NEW YORK, }
City & County of New York, } *ss:*

Be it remembered that on this 25th day of March, A. D. 1897, before me the undersigned, Charles Flynn, a notary public in and for the city, county and State of New York, personally appeared Francis L. Patton, Jr. the subscribing witness to the execution of the foregoing instrument, of lawful age, who being duly by me sworn upon his oath did depose and say: That on the 25th day of March,

1897, he saw the within named Frederick P. Olcott, Henry W. Poor and Henry C. Rouse, sign, seal and deliver the foregoing instrument as their act and deed, and this deponent at the same time signed his name as a witness of the execution of said instrument at the request and in the presence of said Frederick P. Olcott, Henry W. Poor and Henry C. Rouse, who were at the time over the age of twenty-one years and of sound mind and memory, and laboring under no disability, so far as deponent knows.

In witness whereof, I have hereunto set my hands and affixed my official seal the day and year aforesaid.

CHARLES FLYNN,
Notary Public, N. Y. Co.

(No seal affixed.)

Deed of James C. Brooks.

Plaintiff offered in evidence the original deed of James C. Brooks, the only surviving heir at law of James Brooks deceased, and Mary C. Brooks, his wife, to the Louisville, New Albany and Chicago Company, dated February 20th, 1896.

(Identified by the reporter as Exhibit "K.")

And the said deed being then read and given in evidence was in the words and figures following, to-wit:

EXHIBIT "K."

This indenture, made this 20th day of February 1896 be-
258 tween James C. Brooks, the only surviving heir at law of James C. Brooks, deceased and Mary C. Brooks, his wife of Chester county, Pennsylvania party of the first part, and the Louisville, New Albany and Chicago Railway Company, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of one dollar to him in hand paid by the said party of the second part receipt whereof is hereby acknowledged do hereby convey and quit claim unto the said party of the second part, its successors and assigns, real estate located in parts of sections 4 and 9, township 29 and range 4 west Pulaski county and State of Indiana and bounded and described as foliows, to-wit:

Beginning at the southwest corner of Yellow & Bill streets in the town or village of Francisville; thence south along the west line of said Bill street to the north line of Sherman avenue; thence west with said north line of Sherman avenue a distance of one hundred and fifty (150) feet; thence north parallel to said west line of Bill street to the south line of Yellow street; thence east with the south line of Yellow street a distance of one hundred and fifty (150) feet to the place of beginning, said piece or parcel of land being the same

platted and dedicated for depot grounds, and duly recorded April 8th 1862

To have and to hold the same, together with all and singular the privileges and appurtenances thereto appertaining and all rights, claims, titles and interests therein, of said party of the first part, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part have hereunto set their hands and seals the day and year first hereinbefore written.

259 Signed, sealed and delivered in the presence of—

JAS. C. BROOKS. [SEAL.]
MARY C. BROOKS. [SEAL.]

STATE OF PENNSYLVANIA, }
Chester County. }

I, Alawilda Haines a notary public in and for said county in the State aforesaid, do hereby certify that the within named James C. Brooks and Mary C. Brooks, his wife personally known to me as the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed and sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein stated and shown.

Given under my hand and seal, this seventh day of June A. D. 1896.

[SEAL.] ALAWILDA HAINES,
Notary Public.

My commission expires June 7th, 1897.

(Endorsed on back:) Warranty deed. The heirs of James Brooks deceased to the Louisville, New Albany & Chicago Railway Co. Location: (198 Custom House place.)

STATE OF INDIANA, }
Pulaski County, } *ss:*

I do hereby certify that this instrument was filed for record in the recorder's office of said Pulaski county, this 24 day of
260 July A. D. 1896, at 8 o'clock a. m., and duly recorded in Deed Book 59, page- 131-2.

L. E. McKINSEY, *R. P. C.*

Already entered.
JOS. RIGGS,
Aud'r L. N. A. & C. R'y.

Entered in Right of Way Record Book Page —.

—— ——,
Chief Engineer.

Feed paid.

261 *Deposition of J. N. Hayworth.*

Plaintiff offered in evidence the deposition in this case, of James N. Hayworth, auditor of Pulaski county, and the said deposition being then read and given in evidence was in the words and figures following to wit:

THE STATE OF INDIANA, } ss:
White County, }

In the White Circuit Court, April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY Company
vs.
PATRICK MCGUIRE and MEDARY M. HATHAWAY. } Cause No. 902.

The defendants in the above entitled cause are hereby notified that on the tenth day of May, 1899, at the office of the county auditor in the town of Winamac in the county of Pulaski and State of Indiana between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day, before some officer authorized to take depositions, the plaintiff will proceed to take depositions of the following named witnesses, to-wit: James A. Hayworth and W. P. Williams to be used in evidence, on the trial of the above entitled cause, in the circuit court of White county, in the State of Indiana, and will, if necessary, continue said taking from day to day, until said depositions are completed.

Dated this 4th day of May 1899.

E. C. FIELD,
Attorney for Plaintiff.

We acknowledge service of the above notice, and waive certificate of the official character of officer before whom said depositions are taken, this 4 day of May 1899.

CHAS. C. SPENCER,
Attorney for Defendants.

262 *Deposition.*

The deposition of James N. Hayworth, a witness produced and sworn before me, a notary public in and for Pulaski county, Indiana, on the 10th day of May, 1899, pursuant to the attached notice.

This deposition is taken for and on behalf of the plaintiff in a certain action now pending in the circuit court of White county, Indiana, wherein The Chicago, Indianapolis and Louisville Railway

Company is plaintiff and Patrick McGuire and Medary M. Hathaway are defendants.

Present on behalf of the plaintiff its attorney, Mr. Kinnan, and on behalf of the defendants H. A. Steis and Medary M. Hathaway, their attorneys.

The said JAMES N. HAYWORTH being first duly sworn by me to testify to the truth, the whole truth and nothing but the truth relating to said cause deposes as follows:

Examined by Mr. KINNAN, on direct examination:

Q. You may state your name, age, residence, and occupation?
A. James N. Hayworth, age 35, auditor of Pulaski county.
Q. Auditor of Pulaski county, Indiana?
A. Yes, sir.
Q. As auditor of Pulaski county, Indiana, you may state whether or not you have on file, or in your custody the tax schedule or schedules of property, filed for taxation by the Louisville, New Albany & Chicago Railway Company?
A. What dates do you want?
263 Q. Well, for 1897, and years prior thereto?
A. Yes, sir.
Q. I will ask you to look at Schedule B of the property filed by the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, for 1897, and state what your record shows for 1897, on the schedule of property filed by that company for taxation of the property in Francesville for that year?
A. In answering that question the witness reads as follows from the schedule referred to in the question:
"Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany Railway Company in Pulaski county, Indiana April 1st, 1897. Township city or town. Salem township. Francesville. Part section. Section 4—Section 4 township 29 range 4 west. Description. 3 lots (town) 360 x 150 located on west side Bill street between Lyman and Yellow streets." Under column marked "Value" "depot." Under column marked "Value of stations and other improvements on right of way" "$300.00."
Q. I will ask you if you will make an exact copy of this Schedule "B" of 1897, above mentioned, mark it Exhibit "A," attach it to and make it a part of your deposition?
A. Yes, sir.

EXHIBIT "A."

Witness makes a copy of said Schedule B of the property filed by the Louisville, New Albany and Chicago Railway Company for taxation in 1897, which copy is marked Exhibit "A" in red ink, is attached hereto and made a part of this deposition.

Q. I will ask you to look at the schedules in your office for the years, 1889, and succeeding years up to and including
264 the year 1897, and state what property in Francesville in the way of town lots was returned by the Louisville, New Albany and Chicago Railway Company for taxation during those years as shown by schedules on file in your office?

A. All I can say would be in regard to the copy.

Mr. Steis:

Q. Just what the return of the company shows?

A. Return of the company? They would all be the same exactly as my attached copies.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana and state what your record shows for the year, 1896, by the schedule of property filed that year for taxation of the property in Francesville by that company?

A. In answering that question witness reads from schedule as follows:

"Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana April 1st, 1896. Township city and town. Salem township. Francesville, part section. Section- 4 and 9 township 29 range 4. Description. 3 lots (town) each 360 x 150 located on west side of Bill street between Lyman and Yellow streets." Under column marked "Value" "Depot." Under column "Value of stations and other improvements on right of way $300.00."

Q. I will ask if you will make an exact copy of this schedule of 1896, above mentioned, mark it Exhibit "B," and attach it to your depositien and make it a part thereof?

A. Yes sir.

Exhibit "B."

Witness makes a copy of said Schedule B of the property
265 for taxation by the Louisville, New Albany and Chicago Railway Company for the year, 1896, which copy is marked in red ink Exhibit "B," is attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule "B" of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana for the year 1895, and state what your record shows for the year 1895, by the schedule of property in Francesville filed by that company for taxation for that year?

A. In answer to question witness reads as follows from the schedule:

Schedule B. Railroad track. Belonging to or controlled by the Louisville New Albany and Chicago Railway Company Pulaski

county, Indiana April 1st, 1895. Township, city and town. Salem township. Francesville. Part of section. Sections 4 and 9 township 29 range 4. Description. 3 lots (town) each 360 x 150 located on west side of Bill street between Lyman and Yellow streets." Under column, "Value" "Depot." Under columns marked "Value of stations and other improvements on right of way." "$300.00."

Q. I will ask you if you will make an exact copy of Schedule B of 1895, above mentioned, mark it Exhibit "C" attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "C."

Witness makes a copy of said Schedule B of the property filed for taxation by the Louisville, New Albany and Chicago Railway Company in 1895, which copy is marked in red ink "Exhibit" "C," attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, and state what your record shows
266 for the year, 1894, in the schedule of property for that year in Francesville, filed by that company for taxation.

A. Witness reads in answer to question as follows from Schedule B of the property filed by that company in 1894 for taxation: "Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany and Chicago Railway *Railway* Company in Pulaski county, Indiana, April 1st, 1894.

Township. City or town. Salem township. Francesville. Part of section. Section- 4 and 9 township 29 range 4. Description. 3 lots (town) each 360 x 150 located on west side of Bill street between Lyman and Yellow streets. Under column "Value." "Depot."

Under column marked. "Value of stations and other improvements on right of way." $300.00."

Q. I will ask you if you will make an exact copy of this Schedule B of the property filed for taxation in 1894, above mentioned mark it Exhibit "D," attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "D."

Witness makes a copy of said Schedule B of the property filed by said company for taxation in the year 1894, which copy is marked in red ink "Exhibit "D," attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, for the year 1893, and state what your rec-

ord shows for the year 1893, by the schedule of property for that year in Francesville filed by said company for taxation?

267 A. In answering the question the witness reads as follows from the schedule referred to:—

"Schedule B. Railroad track. Belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana April 1st. 1893. Township, city and town. Salem township. Francesville. Part section. Sections 4 and 9 township 29 range 4. Description. 3 lots (town) each 360 x 150 located on west side of Bill street between Lyman and Yellow streets."

Under column "Value of stations and other improvements on right of way. "Depot. $300.00."

Q. I will ask you if you will make an exact copy of Schedule B of the property returned for taxation by said company for the year 1893, mark it Exhibit "E," attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "E."

Witness makes a copy of Schedule B of the property filed for taxation by said company for the year 1893, which copy is marked Exhibit "E" in red ink, attached to this deposition and made a part hereof.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana and state what your record shows for the year 1892, by the schedule of property in Francesville filed for taxation that year by that company? (No answer.)

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, for the year, 1892, and state what

268 your record shows for the year 1892 by the schedule of property for that year in Francesville by that company?

A. In answer to the question the witness reads as follows from th-schedule referred to:—

"Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, April 1st, 1892. Township, city or town. Salem township Francesville. Part of section. Section- 4 and 9 township 29 range 4. Description. 3 lots (town) each 360 x 150 located on west side of Bill street between Lyman and Yellow streets." Under column marked "Value of stations and other improvements on right of way." "Depot. $300.00."

Q. I will ask you if you will make an exact copy of Schedule B, of the property returned for taxation by said company in 1892, attach it to your deposition and mark it Exhibit "F," and make it a part thereof?

A. Yes, sir.

EXHIBIT "F."

Witness makes a copy of said Schedule B of the property filed for taxation for the year 1892, by the Louisville, New Albany and Chicago Railway Company, which copy is marked in red ink Exhibit "F," attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, for the year, 1891, and state what your record shows for that year by the schedule of property for the year 1891, in Francesville filed by that company?

A. Witness in answer to the question reads as follows:—

269 "Schedule B. Railroad track" belonging to or controlled by the Louisville, New Albany and Chicago Railway Company, April 1st, 1891. Township city or town. Salem township. Francesville. Part section. Section 4 and 9 township 29 range 4. Description. 3 lots each 360 x 150 located on west side of Bill street between Lyman and Yellow streets." Under column marked "Value of stations and other improvements on right of way" "Depot. $300.00."

Q. I will ask you if you will make an exact copy of the schedule above referred, to mark it Exhibit "G," attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "G."

Witness makes a copy of Schedule B of the property filed for taxation by the Louisville, New Albany and Chicago Railway Company for the year, 1891, which copy is marked in red ink "Exhibit "G," attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company for the year 1890, in Pulaski county, Indiana, and state what your record shows for the year 1890 by the schedule of property for that year in Francesville by that company?

A. Witness reads as follows from Schedule B. above referred to, in answer to the above question:—

"Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, April 1st, 1890. Township, city or town. Salem township. Francesville. Sections 4 and 9 township 29, range

270 4 west. Description. 3 town lots each 360 x 150 located on west side of Bill street, between Lyman and Yellow streets." Under column, "Value of stations and other improvements on right of way." "Depot" $300.00."

Q. I will ask you if you will make an exact copy of Schedule B of the property filed for taxation by said company for the year 1890,

mark it Exhibit "H" attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "H."

Witness makes a copy of Schedule B of the property returned for taxation for the year 1890 by the Louisville, New Albany and Chicago Railway Company, which copy is marked in red ink "Exhibit "H," attached hereto and made a part of this deposition.

Q. I will ask you to look at Schedule B of the property belonging to the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, and state what your record shows for the year 1889, by the schedule of property in Francesville for that year, filed by that company for taxation?

A. Witness in answering the above question reads as follows from schedule referred to:—

"Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany and Chicago Railway Company in Pulaski county, Indiana, April 1st, 1889. Township city or town. Salem township. Francesville. Sections 4 and 9 township 29, range 4 west. Description. 3 town lots each 360 x 150 located west of Bill street, between Lyman and Yellow streets. Under column. "Value."

"Depot." Under column, "Value of stations and other im-
271 provements on right of way." $300.00.

Q. I will ask you if you will make an exact copy of Schedule B of the property filed for taxation by said company for the year 1889, mark it Exhibit "I" attach it to your deposition and make it a part thereof?

A. Yes, sir.

EXHIBIT "I."

Witness makes a copy of schedule of property returned by the Louisville, New Albany and Chicago Railway Company for taxation for the year, 1889, which copy is marked Exhibit "I" in red ink, attached to and made a part of this deposition.

(Witness also attaches his affidavit to the copies above referred to and makes it a part thereof.)

Q. You may state whether or not these lots you have described as being returned by the said railway company for the year 1897, *and* were the same as returned by the said company for taxation for the year 1889, and succeeding years up to 1897, as shown by the schedules?

A. Yes.

Q. You may state whether or not the schedules for the years prior to 1889, are in such shape that you can get at them without a vast amount of trouble?

A. Well, I suppose they are here but I do not know it to be sure.

Q. They are not in this office are they?

A. No they are not in this office, they are in the vault below if they are here at all. I have never seen them.

Q. Never seen them?

A. No, sir.

272 Cross-examination by Mr. STEIS is here taken up as follows:

Q. You may state if the schedules you have been speaking of in your examination in chief are all the schedules you have—that is to say the schedules for the year 1889 and succeeding years up to 1897, inclusive,—within your knowledge?

A. I can answer, yes, I think.

Q. Sir?

A. Yes, I think it is.

Q. You are testifying now are you from your examination of the schedules are you?

A. Yes sir.

Q. And what you have testified about in your examination in chief as to what was shown by the return made by the railway company is as it is shown by the schedules themselves?

A. Yes, sir.

Q. And not from any other record?

A. No, sir.

Q. No other record?

A. No, sir.

Q. You may state, if you have any knowledge of any other schedules besides these you now have before you?

A. Of this kind?

Q. Yes, sir that kind?

A. No.

Q. And for what years are the schedules as made by the railway company that you now have before you?

A. For the years 1889 to 1897, inclusive.

I believe that is all.

273 Redirect-examination of witness is here resumed as follows:

Q. How long have you been auditor of Pulaski county?

A. Since November.

Q. Of last year?

A. Last year. November 25th.

Q. You may state whether or not you have belonging to your office a vault in which there are a lot of old papers somewhat mixed up and which you have never examined or investigated to see whether there were any other schedules there or not?

A. Yes, we have a vault of that kind.

Q. You may state whether or not you have ever looked into that vault to see whether or not there were other schedules in that vault?

A. I never did.

Q. State whether or not the papers in that vault are filed or indexed so you can readily find or get at them?

A. That is a question I cannot answer: they should be but it seems they *hain't*.

Q. That is what I was trying to get at. Your deputy told me they were not.

A. I don't know.

JAMES N. HAYWORTH, *Witness.*

STATE OF INDIANA, } ss:
Pulaski County, }

I, Sarah Decker a notary public within and for said county and State do hereby certify that the above named deponent was first duly sworn by me to testify to the truth, the whole truth and
274 nothing but the truth in the cause at issue; that his deposition was reduced to typewriting by me, a disinterested person; that the plaintiff was represented by its attorney, Mr. Kinnan, and the defendant *was* represented by their attorney, H. A. Steis, and Medary M. Hathaway being present on his own behalf; that said deposition was taken in the auditor's office of Pulaski county, Indiana on the 10th day of May, 1899, between the hours of 8 o'clock a. m. and six o'clock p. m. pursuant to the annexed notice.

I also certify that the above and foregoing is a full, true and complete copy of all evidence introduced during the taking of said deposition, including the oral evidence and the copies of exhibits made a part of the deposition by the witness and marked as Exhibits "A," "B," "C," "D," "E," "F," "G," "H," and "I"; and that said deponent read over the deposition before signing the same.

[SEAL.] SARAH DECKER,
Notary Public.

My commission expires July 31st, 1902.

Cost of Deposition.

Witness one day's fees	$1.50
H. N. Hayworth for copies of exhibits and testifying	2.75
For taking deposition at 10 cts. per 100 words	3.00
Swearing witness and certificate	.50
Total	$7.75

275 EXHIBIT "A."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1897.

Township, city or town.				
Salem township.....	Section 4.	Township 29	Range 4.
Francesville.....	" 9.	" "	" "

Description:

3 lots (town) each. 360 x 150 located on west side Bill street between Lyman and Yellow street-.

Value —. Depot.
Value of stations and other improvements on right of way. 300.00.

276 EXHIBIT "B."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1896.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 lots (town) each. 360 & 150 located on west side Bill street between Lyman and Yellow streets.

Value —. Depot.
Value of stations and other improvements on right of way. 300.00.

277 EXHIBIT "C."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1895.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 lots (town) each 360 x 150 located on west side Bill street between Lyman and Fellows Sts.

Value —. Depot.
Value of station and other improvements on right of way. $300.00.

278 EXHIBIT "D."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1894.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 lots (town) each 360 x 150 located on W. side Bill St. betwe en Lyman and Yellow streets.

Value —. Depot.
Value of station and other improvements on right of way. $300.00.

279 EXHIBIT "E."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1893.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 lots (town) each 360 x 150 located on W. side of Bill St. between Lyman and Fellow Sts.

Depot.
Value of station and other improvements on right of way $300.00.

280

EXHIBIT "F."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1892.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 lots (town) each 360 x 150 located on W. side of Bill street between Lyman and Fellow streets.

Depot.

Value of station and other improvements on right of way. $300.00.

281

EXHIBIT "G."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1891.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 town lots each 360 x 150 located on west side of Bill street between Lyman and Fellow streets.

Depot.

Value of station and other improvements on right of way. $300.00.

282

EXHIBIT "H."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1890.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	4/9	29	4

Description:

3 town lots each 360 x 150 located on west side of Bill St. between Lyman and Fellow streets.

Depot.

Value of station and other improvements on right of way. $300.00.

283 EXHIBIT "I."

Schedule Railroad Track

Belonging to or controlled by the Louisville, New Albany & Chicago Ry. Company in Pulaski county, Indiana, April 1st, 1889.

Township, city or town.	Section.	Township.	Range.
Salem township, Francesville.....	9/4	29	4

Description:

3 town lots each 360 x 150 located west side of Bill St. between Lyman and Felton St.

Value —. Depot.
Value of station and other improvements on right of way. $300.00.

284 STATE OF INDIANA, } ss:
County of Pulaski, }

I James N. Hayworth auditor of Pulaski county State of Indiana do hereby certify that the foregoing and attached statements are a true and complete copies of section "B" of the schedules of property as filed in my office by the Louisville New Albany and Chicago Railway Company for the years from 1889 up to 1897 as stated in said copies.

Witness my hand and official seal this 10th day of May 1899.
[SEAL.] JAMES N. HAYWORTH, *Auditor.*

285 (Endorsed on back:) Cause No. —. Chicago, Indianapolis & Louisville Ry. Co. *vs.* Patrick McGuire & Medary M. Hathaway. Deposition of James N. Hayworth auditor Pulaski county, Ind. Filed May 18, 1899. F. B. Humston, clerk. (Enclosed in envelope, addressed as follows:) Clerk of circuit court, White county, Indiana, Monticello, Indiana. Chicago, Indianapolis and Louisville Railway Company *vs.* Patrick McGuire and Medary M. Hathaway. Filed May 15, 1899. F. B. Humston, clerk.

286 *Samuel Petrie, Witness.*

SAMUEL PETRIE, a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows, to-wit:

Examination in chief.

Questions by Judge FIELD, of counsel for the plaintiff:

Q. State your name to the court and jury?
A. Samuel Petrie.
Q. Where do you live?

A. Francesville, Pulaski county, Indiana.
Q. How long have you lived there?
A. I have lived there ever since August, 1865.
Q. If you hold any official position in the town of Francesville, you may state what it is?
A. I have held the town treasurership six terms.
Q. Are you still town treasurer?
A. I wasn't elected last term, but I haven't turned the books over yet.
Q. The other man hasn't qualified yet?
A. He has qualified but he has never receipted for the books yet.
Q. Have you the tax duplicates of the town of Francesville?
A. Yes sir.
Q. Turn to your tax duplicate of 1891, at page 26, and if you find any entry there of taxes upon the tax duplicate against the railway company, you may state the entry to the jury?

The defendants objected to the question, because this complaint is a declaration that the plaintiff is the owner in fee simple of this property, averring a legal title, which means a title by proper deed, proper conveyances; the only title they can claim under this
287 complaint is that kind of a title; that is no way to prove title, proving a man has paid taxes; that does not tend to prove a legal title; they cannot come into court and rely upon a legal title, averring they are owners in fee simple and then bolster it up by proving that they paid taxes and have been in possession; that is no evidence tending to establish a title in fee simple. They must stand upon the first paragraph of complaint, that they are the owners in fee of this property by an indefeasible title by proper and legal conveyances from the owners of the land and they can not bolster it up by showing an equitable title; they cannot show an easement; they can not bolster it up by showing they paid taxes; the railroad company by possession, adverse possession, can only acquire an easement; the railroad company can not acquire fee by any other way except by a deed.

The court sustained the objection, to which ruling of the court, the plaintiff at the time, excepted.

Plaintiff offered to read in evidence from the tax duplicate of the town of Francesville, at page 26, the following entries:

"Louisville, New Albany and Chicago R. R. main track, 8550. Louisville, New Albany and Chicago R. R. side track, 1535. Louisville, New Albany and Chicago R. R. rolling stock, 1550. Louisville, New Albany and Chicago R. R. improvements, 390. Louisville, New Albany and Chicago R. R. repairing material, $125. One acre and one-half in section 4, town. 29, range 4 $150. Louisville, New Albany and Chicago R. R. one and one-half acre in section 9, town. 29, range 4 west," $150. The record shows $80.34 was paid in full under protest.

The court still sustained defendants' objection, and refused
288 to allow plaintiff to make such proof, to which ruling of the court, the plaintiff at the time excepted.

Q. Mr. Petrie, the lots that stand taxed there, two lots as an acre and a half each, are the depot grounds in Francesville?
A. Yes, sir, what is called the depot grounds.

Defendants objected to the question and moved the court to strike out the answer thereto, because it is a conclusion.
The court sustained the objection and the motion to strike out the answer, to which ruling of the court, the plaintiff, at the time excepted.

Q. What lots are those that are designated as acre and a half lots on which assessment is made?

Defendants objected to the question, because that does not call for any explanation.
The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted, and plaintiff offered to show in answer to the question that the lots appearing on the tax duplicate at that page 26 were the lots within the boundaries, marked depot grounds in the town of Francesville.
The court still sustained the defendants' objection, and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

Q. You may state, Mr. Petrie, whether the same form of entry appears upon your tax duplicate with reference to the same property from the year 1891, to 1898, inclusive and for each year thereof?

Defendants objected to the question, because as stated before, it does not tend to prove the averments of the complaint.
The court sustained the objection, to which ruling of the
289 court, the plaintiff, at the time excepted, and the plaintiff offered to show that the tax duplicate in the hands of the witness shows the entry of this property embraced in the preceding entry for each year during said period of time.
The court still sustained the defendants' objection, and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time excepted.

Q. State whether or not the tax duplicate shows the payment of the taxes during those years?

Defendants objected to the question.
The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted, and the plaintiff offered to show, in answer to the question, that the Louisville, New Albany and Chicago Railway Company paid taxes for each year on the property mentioned, from 1891, to 1898 inclusive.

The court still sustained defendants' objection and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

Q. Mr. Petrie, you may turn to your tax duplicates at page 127, with reference to an assessment for street improvement in the town of Francesville; do you know where those streets are that were gravelled and improved?

A. Yes, sir.

Q. Where are they with reference to the ground up there marked depot grounds at Francesville?

A. On the east on Bill street, on the east of the grounds, and on Montgomery street; it is in section 4, that street is.

Q. The street on the east of the grounds marked depot grounds is a north and south street, or east and west street?

290 Defendants objected to the question.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted.

A. Bill street runs north and south.

Q. For how many feet?

A. It runs three blocks north and south.

Q. The whole length of the open space where the depot building is?

A. Yes sir, the whole length of that.

Q. Look at page 127 of your tax duplicate and say how much on account of that improvement appears to be assessed against the land adjoining, in the name of the Louisville, New Albany and Chicago Railway Company?

A. Sixteen hundred and forty-one dollars.

Defendants objected to the question and moved the court to strike out the answer.

The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted, and plaintiff offered to show in answer to the question that the land known as depot grounds in the town of Francesville, was assessed by the town authorities in the sum of sixteen hundred and forty-one dollars, for gravel street improvement upon streets running north and south on the east side of the depot grounds, and one street running east and west through the depot grounds. The court still sustained defendants' objection, and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff at the time, excepted.

Q. Mr. Petrie I will ask you to refer to that record and state whether any portion of that tax appears to have been paid by the Louisville, New Albany and Chicago Railway Company for the year 1896, and if so, how much?

291 Defendants objected to the question, because it does not tend to prove the averments of the complaint.

The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted; and plaintiff offered to prove in answer to the question, that the railway company paid for street improvements on lands adjoining depot grounds, and on the street running through the same, the sum of two hundred seventy dollars and seventy-five cents.

The court still sustained the defendants' objection, and refused to allow the plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

Q. Mr. Petrie turn to your tax duplicate on page 16, and you may state to the jury whether the record shows that the Louisville, New Albany and Chicago Railway Company paid in the year 1897, on account of the street improvements, gravelling etc., of the streets hereinbefore referred to, the sum of two hundred and fifty-two dollars and seventy-two cents on account of that land?

A. Defendants objected to that question, because it is not warranted by the complaint.

The court sustained the objection, to which ruling of the court, the plaintiff at the time, excepted; and plaintiff offered to prove in answer to the question that the railway company referred to paid in said year for street improvements assessed against the depot grounds in Francesville, the sum of two hundred fifty-two dollars and seventy-two cents.

The court still sustained the defendants' objection, and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

292 Q. Mr. Petrie turn to your record on page 32, and state to the jury whether on the tax duplicate that you have before you of the town of Francesville, there appears on that page an assessment against the Louisville, New Albany and Chicago Railway Company, for street improvements in the town of Francesville, on the street running lengthwise of the depot ground and one crossing the depot ground?

Defendants objected to the question, because it is not warranted by the complaint.

The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted; and plaintiff offered to prove in answer to the question that there is such an assessment noted.

The court still sustained defendants' objection, and refused to allow the plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

Q. How much does your record show on the page referred to, as paid in the year, on account of street improvements?

Defendants objected to the question, because it is not warranted by the complaint.

The court sustained the objection, to which ruling of the court, the plaintiff, at the time, excepted; and plaintiff offered to prove in answer to the question, that the amount paid was thirty-nine dollars and thirty-eight cents.

The court still sustained defendants' objection, and refused to allow plaintiff to make such proof, to which ruling of the court, the plaintiff, at the time, excepted.

Q. In 1865, was there a depot building constructed on this land?

Defendants objected to the question.

293 The court sustained the objection, to which ruling of the court, the plaintiff, at the time excepted; and plaintiff offered to show that the depot was constructed at that time on this land in controversy.

Defendants withdrew their objection.

By Judge WINFIELD: We in our answer make no claims to the north side of these lots.

The question was withdrawn.

By Judge FIELD:

Q. When you went there in 1865, was there a depot building on the line of the Louisville, New Albany, and Chicago railway at Francesville?

A. Yes sir.

Q. What was its appearance as to being a new building, or old building?

A. It was a tolerably old building.

Q. How long, from its appearance, would you say it had stood at that place?

A. Perhaps ten or twelve years.

Q. Was there a railroad track running north and south through the lands near where the depot building stood?

A. Yes sir.

Q. That has been maintained there ever since?

A. Yes sir.

Q. Has the depot building been maintained there?

A. It burned down in 1878, the old depot.

Q. Was a new one constructed?

A. Yes sir, a new one was constructed since.

Q. Were there any stock pens there when you went there in 1865?

A. Yes sir.

Q. What was their appearance as to having been constructed long prior, or about that time?

294 A. They had been constructed I presume some time before that.

Q. From appearances, how many years?

A. Perhaps eight or ten years, I expect from the look of them; I couldn't say exactly.

Q. How many buildings are there facing on this depot ground in the town of Francesville, on the east side of it?

Defendants objected to the question because it is immaterial.

Plaintiff offered to show in answer to this question that there is a row of buildings built up in the town facing on the depot plat.

By the COURT: Is the purpose to show adverse possession?

By Judge FIELD: I simply claim the public have built with reference to the plat as well as our rights.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

(By the WITNESS:)

A. Commencing at the south part there is the Christian church; W. C. Haymond, and R. Brenneman, that is in block twenty-two on the east side; and then there is Mr. Hayworth and Mallon owns a half lot on block fourteen, lot seven, the west half of the lot; then J. R. Hayworth, the Emsing Gagen Company, and B. Hullinger, Dasiky & Petrie, Masonic lodge, John H. Culbo, S. Petrie, John Kopke, John H. Mallon, Hannah Byers, and A. G. Fisher.

It is admitted by the defendants that it is all built up, all along on Bill street facing the west.

Q. In front of these buildings that are lined on the east of Bill street, is the grounds in controversy?

A. Yes sir.

Q. How many of those buildings on the east side of Bill street were constructed when you went there in 1865?

295 A. There is very few of them there now.

Q. They have been replaced by others?

A. Yes sir, they have been replaced by others.

Q. Were there some buildings there in 1865, built on that land?

A. Yes sir, there is very few buildings that was constructed in 1865 that is there now; there is one, Dasiky and Petrie, is one building in there that was constructed before 1865, and the Hannah Byers building was constructed there when I came there.

Q. Part of this property is residence property and part business places, and a church?

A. Yes sir.

Q. Look at that picture and say if that represents the east side of the town of Francesville, or what is claimed to be depot ground? (Handing witness a photograph to examine.)

A. Yes sir, the west side is depot grounds here.

Q Do those improvements abut on what is claimed to be depot grounds?

A. Yes sir.

Plaintiff offered the photograph in evidence.

Defendants objected to the introduction in evidence of the photograph, because there is no showing when it was taken.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted; and the said photograph being then given in evidence and exhibited to the jury was the same as appears upon the following page of this transcript. (Identified by reporter as Exhibit L.)

Photograph.

(Here follows photograph marked page 295*a*.)

Exhibit L

Exhibit M.

296 Q. Mr. Petrie on the west side of what is claimed as the depot grounds, you may state whether or not there is a row of buildings on the west side to the length of what we claim is depot grounds?

Defendants objected to the question, because that is clear beyond the lands in controversy; it is across the railroad track on the west side, and the defendants are claiming no interest whatever in the lands there where the depot is and on the right of way.

By Judge FIELD: We want to show what has been done with reference to the investment of property.

The court overruled the objection, to which ruling of the court, the defendants, at the time, excepted.

A. Yes sir, there is.

Q. How many buildings on the west side fronting on what we claim the depot grounds in the town of Francesville?

A. Commencing at Lyman avenue is David Welsh and I believe Alpheus Hollinger owns a building; the widow Andrews owns a building, David Hazen next, Julia Conner next, and Mrs. Dodge; Samuel Petrie has a half lot there, and then Mrs. Dodge and Mrs. Hazen; then John J. Kopke, and Mrs. Dodge, J. V. Reese, and Mrs. Bledsoe and Harry Bledsoe and O. W. Calvert; that is all.

Q. Are those buildings that you speak of built substantially in line north and south, facing what we claim is the depot grounds?

A. Yes sir.

Photograph.

Q. Look at the picture that I hand you, and state whether that represents the west side of the improvements facing on what is claimed is depot grounds?

A. Yes sir.

297 Plaintiff offered the picture in evidence, and the said picture being given in evidence and exhibited to the jury was the same as appears upon the following page of this transcript. (Identified by the reporter as Exhibit M.)

(Here follows photograph marked page 297*a*.)

298 Cross-examination:

Questions by Judge WINFIELD, of counsel for the defendants:

Q. You went there in 1864?
A. August, 1865.
Q. Was it built up on the east line of Bill street facing the west when you went there?
A. Not all of it.
Q. There were houses there?
A. There was no warehouse there.
Q. On the east line of Bill street facing west was there buildings on that line in 1865?
A. There was some.
Q. Were they old buildings?
A. Yes sir, they were old buildings.
Q. How long do you suppose they had been there—as much as ten years?
A. Yes, sir, maybe longer than that.
Q. They had been there prior to 1862?
A. I expect they had.
Q. That line, the line of Bill street was marked there by those buildings as much as ten years before 1865?
A. Yes sir, I expect it was.
Q. How long was it on the west side?
A. About the same way?
Q. They were all old buildings?
A. Principally old buildings.
Q. Standing there yet?
A. Part of them are standing and part torn away.
Q. How long do you think they had been there in 1865, when you went there?
A. I couldn't say; they were pretty old buildings.
Q. Been there as much as ten years?
299 A. I expect they had.
Q. Long prior to '65?
A. Yes sir, I expect so.
Q. You have been asked what is along the east line of Bill street facing west; what is along the west line of Bill street facing east?
A. Mr. Prewett's grain office and the post office, and there is a lumber office, that is facing to the east.

Plaintiff objected to this evidence, because it is not cross examination.

Defendants offered to show by this witness on cross-examination that this ground is all built over on the west line of Bill street between that and the depot, with offices, post office, lumber yards, blacksmith shop, and grain buyers, elevators, and that no part of

this land in controversy is used by the railroad for railroad purposes.

The court still sustained the plaintiff's objection, and refused to allow the defendants to make such proof, to which ruling of the court, the defendants, at the time excepted.

300 *Evidence of Robert Field.*

ROBERT FIELD, a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows, to-wit:

Examination in chief.

Questions by Judge FIELD, of counsel for the plaintiff:

Q. State your name to the court and jury?
A. Robert Field.
Q. Were you at Francesville last week one day to have some photographs taken?
A. Yes sir.
Q. Were you there when the party took them?
A. Yes sir.
Q. State where the instrument stood when he took this picture showing the property to the east?
A. The instrument stood at the south end of the depot grounds.
Q. What is called the depot grounds?
A. Yes sir, what is called the depot grounds—it stood just a little bit west of the road that runs—stood south of the road that runs east and west, and a little west of the road that runs north and south.
Q. Where did the instrument stand when the picture was taken showing the property to the west of the track?
A. It stood to the south end of what is called the depot grounds, and a little south of the street running east and west, and in the middle of the main track.

301 Cross examination.

Questions by Judge WINFIELD, of counsel for the defendants:

Q. Are you a son of Judge Field's?
A. Yes sir.
Q. Did you take the photographs yourself?
A. No sir.
Q. Who was the photographer or artist?
A. His name was Frank Grafton.
Q. Where does he live?
A. At Francesville.

Q. Do you know what kind of a camera he had?
A. No sir.
Q. You know you didn't get a very large view?
A. He had a good sized camera, but he took a long distance picture.
Q. He was off a long distance?
A. He was off a little ways, not very far from the first house here, but as it went down, the distance got longer.
Q. It got very dim and distant?
A. Yes sir.
Q. He didn't get a very good view of Bill street there?

Plaintiff objected to the question, because the picture shows for itself.

Q. This view here, (indicating on photograph) is away south of Montgomery street, that view where it shows lumber piled up is away south of Montgomery street, isn't it?
A. I don't know the names of the streets.
Q. Isn't it away south of the depot?
A. It is a little bit over a block south of the depot.
Q. Commencing at this point here (indicating on the photograph) looking where you stood, it was built up all along there on
302 the west line of Bill street, wasn't it, which is not disclosed in that photograph?

Plaintiff objected to the question, because it is not cross-examination of anything asked the witness in chief; he was simply asked where the instrument stood when the pictures were taken.

Defendants offered to show that that instrument was placed at a point just where it would show the east line of Bill street and wouldn't show the west side.

Q. Where you stood there at the time this instrument was set, you couldn't see the west line of Bill street at all could you, except the first house?
A. I don't know which Bill street is.
Q. It is the street which runs north and south; you couldn't see the west line of Bill street at all, could you, except that first house that cut off the view?

Plaintiff objected.

Q. You looking in the same direction the camera was, you couldn't see the west line of Bill street, could you?
A. No sir.

303 Plaintiff re-offered in evidence the plat heretofore offered, marked Exhibit A., with the quitclaim deed, made in February, 1896, in connection with it, the deed having already been introduced and read in evidence (marked Exhibit K.) and plaintiff offered to introduce it in supplement of that, the deed from Brooks to the company.

By the COURT: What is the purpose of it, Judge Field?

By Judge FIELD: The purpose is this, that the grantor in that deed, as Judge Winfield says,—it is true, and I have no doubt he will prove it as he did on the other trial—that Brooks, deceased, was the owner in fee simple of the property, and that instead of disputing the title, or the easement, he confirmed it by this deed, and the effect of the deed was to date back to the time the plat was filed and give to the true owner whatever title the plat itself would give; If Brooks was the owner, then of course he ratified that entire plat; it is not necessary for it to be made by the owner to be adopted by the owner.

Defendants objected to the introduction of the plat in evidence, for the reasons given, when the plat was first introduced or offered in evidence.

The court sustained the objection, and refused to allow the plat to be given in evidence and exhibited to the jury, to which ruling of the court, the plaintiff, at the time excepted. The plat so offered and refused by the court is marked Exhibit A., and appears at page — of this transcript.

Plaintiff here rested its case.

304 *Admission.*

It is admitted by the parties to this suit that the papers about to be offered are the papers in the case of Patrick McGuire against The Louisville, New Albany and Chicago Railway Company, in a suit commenced March 19th, 1895;

Defendants offered first, the amended complaint filed February 11th, 1896., (identified by the reporter as Exhibit N.,) and the said amended complaint being then read and given in evidence was in the words and figures following, to-wit:

EXHIBIT N.

Plaintiff's Evidence, Amended Compl.

THE STATE OF INDIANA, } ss:
White County, }

White Circuit Court, February Term, 1896.

PATRICK MCGUIRE
vs.
THE LOUISVILLE, NEW ALBANY & CHICAGO Railway Company. } Amended Complaint.

The plaintiff Patrick McGuire, complains of the defendant The Louisville, New Albany & Chicago Railway Company, and avers

that during the years 1891 and 1892 he was engaged in the business of buying for shipment to Chicago and other points, hay, straw, and other farm products at the station of Marlborough, in Jasper county, Indiana; that for the purpose of facilitating the business of buying and shipping such products, the plaintiff purchased, built and maintained hay presses and wagons, for the purpose of handling such products, all at a great expense to himself, to-wit: in the sum
305 of one thousand dollars.

Plaintiff further avers that the defendant, The Louisville New Albany and Chicago Railway Company, was, during the year 1891, and for ten years prior thereto, and ever since has been a corporation organized under the laws of the State of Indiana, and engaged in the business of a common carrier and shipper of straw, hay, grain, and other kinds of farm products, and also of all kinds of movable property from and between the station of Marlborough in Jasper county, Indiana, to Chicago and other points in the State of Illinois and to Louisville and other points in the State of Kentucky; to Cincinnati and Columbus and other points in the State of Ohio; to Pittsburg, Philadelphia, Lansdale, New Castle and other points in the State of Pennsylvania, to New York city, Cobleskill and other points in the State of New York; to Baltimore and other points in the State of Maryland, and to other cities and towns in the eastern and central parts of the United States, with its general freight agency at the city of Chicago, in the State of Illinois; that its main line extends from Chicago, Illinois, through the State of Illinois and through the State of Indiana, and to Louisville, Kentucky, and from Chicago, Illinois to Indianapolis, Indiana.

That Marlborough is a station upon the defendant's line of road in Jasper county, Indiana; that during the year 1892 and for many years prior thereto, the defendant, The Louisville, New Albany, & Chicago Railway Company, scheduled its freight rates without division into parts or interest to all of the cities and towns, aforesaid, and also to all the Atlantic sea-board cities, and also to all intervening towns and cities, intermediate between said station of Marl-
306 borough, and issued shipping bills without change of cars from said station of Marlborough to Cincinnati, Columbus, Lansdale, New Castle, Philadelphia, Pittsburg, Pennsylvania, and other points herein named. That the defendant, the railway company, during all said years and for many years prior thereto held itself out as a common carrier and shipper of hay, straw, grain and other farm products from plaintiff's place of business at Marlborough aforesaid to each and every one of the towns and cities aforesaid, and to intermediate towns and cities; that the defendant, the railway company, during all of said time advertised for freight business and continuously operated the sole and only line of railway over which surplus farm products in the vicinity of the station of Marlborough, as aforesaid, could be transported to market continuously during the year of 1891, and for many years prior thereto, and ever since; that the said defendant, railway company, during all of said

time owned and operated the only line of railway from said station of Marlborough directly to the cities of Chicago, Cincinnati and other towns and cities aforesaid, and in fact controlled such an interest in and held such shipping contracts with other railways that no re-shipment or re-billing of freight was required between said station and the cities and towns aforesaid, or the station between said cities and towns of said station of Marlborough, and during all said period of time held itself out as a common carrier of freight from said station of Marlborough, to all of said points, offering to enter into contracts with shippers to ship the aforesaid farm products upon certain schedule rates, without any change of cars whatever.

Plaintiff further avers that he was, during the years 1891,
307 and 1892, engaged in the general business of buying hay and straw of the farmers and other persons having the same for sale, at and in the vicinity of the station of Marlborough, Jasper county, Indiana, and shipped the same for sale in the markets of the cities and towns aforesaid. That he was induced to enter into said business and provided means for handling hay and other farm products at said station of Marlborough on the representation, assurances and offer of the defendant, railway company, its officers and agents, that it, the defendant railway company, was a common carrier of such merchandise, and would with promptness and diligence transport such hay and farm products in suitable cars to the cities and towns aforesaid, and was willing to enter into contracts for the shipment of the same to points aforesaid, and in the manner aforesaid. That the defendant, railway company, held itself out to the plaintiff as a common carrier for hire on a continuous line from plaintiff's said line of business and shipping points to the markets at the cities and towns aforesaid, by a continuous line of transit, and it was and became the duty of the defendant railway company, to furnish this plaintiff at said station of Marlborough, suitable cars upon demand to ship and tender such hay and straw so purchased by him for the purpose aforesaid for shipment to the towns and cities aforesaid; that the plaintiff, relying on the conduct, assurance and representations of the defendant railway company and his rights and privileges to have said hay and farm products transferred over and along the line of said defendant's railway company, railroad and connecting lines purchased during the month of October, 1892, a large quantity of hay, to-wit:—872 81/100 tons, at and in the vicinity of the station of Marlborough
308 and tendered the same to the defendant at the station of Marlborough aforesaid, for shipment to the cities of Chicago, Pittsburg, New Castle, Pennsylvania, Lansdale, Pennsylvania, Cobleskill, New York city, N. Y., Cincinnati, Ohio, and other cities and towns aforesaid, and demanded suitable cars to ship the same; and this plaintiff further avers that at the time of said tender of shipment and demand of cars he was ready and willing and able to pay the freight thereon, but the defendant did not require pre-pay-

ment of freight, but was accustomed to and did ship without prepayment of freight and collected the same from the consignees.

This plaintiff avers that the defendant, in disregard of its duty, in that respect, failed, neglected and refused to furnish cars as requested; that it was the duty of the defendant, railway company, upon such demand for cars, and tender of shipment to furnish the plaintiff with cars within a reasonable time, but that the said defendant failed, refused and neglected to furnish cars within a reasonable time; that by reason of the failure, neglect and refusal of the defendant to furnish cars, as aforesaid, 350 tons of hay which this plaintiff had hauled to the track of the defendant and tendered at the usual place of receiving freight for shipment, lay for a long time, to-wit:—40 days, exposed to the weather, defendant refusing, neglecting and failing to furnish the plaintiff with cars to ship the same, although requested to do so by the plaintiff and cars demanded, and by reason of said neglect, failure and refusal to furnish cars and by reason of the fact that said hay was thus exposed to the weather, it became damaged and lost and entirely destroyed without the fault of this plaintiff, he in nowise contributing in any way thereto, but said hay was lost and destroyed solely through the fault, negligence and wrongful conduct of defendant, as
309 aforesaid; by reason of its failure, neglect and refusal to furnish cars; that said hay thus lost and destroyed was of the value of $3000, which sum is wholly unpaid, principal and interest; that about the month of January, 1893, of said 872 tons of hay thus purchased plaintiff tendered 40 tons of said hay to the defendant for shipment and demanded suitable cars therefor to ship the same to the city of Chicago, State of Illinois; that the defendant after long delay, to-wit:—30 days, *frunsihed* the plaintiff his cars to ship said hay to said city of Chicago, but, without the knowledge of the plaintiff, said cars were leaky and by reason thereof rain and melted snow got in and upon said hay before the same was delivered in the city of Chicago and that of the amount thus shipped to Chicago some was damaged and became worthless to the amount of $29.11; that said loss was without the fault of this plaintiff; that of said 872 tons of hay the plaintiff tendered two car loads to the defendant for shipment to Cobleskill, New York; that the defendant furnished this plaintiff with two cars to ship the same and received the freight and billed the same through to the said Cobleskill without change of cars but that without the knowledge of the plaintiff and without any fault upon his part, said cars were leaky and unfit to ship hay in and by reason thereof a portion of said hay became damaged to the amount of $30.88; that said shipment was about January, 1893; that said damages were wholly unpaid;

This plaintiff avers that of said 872 tons thus purchased plaintiff tendered a car load of nine tons to the defendant for shipment to the city of Philadelphia; that the defendant furnished a car and received said hay and billed the same to the city of Philadel-
310 phia and shipped the same, but without the fault or knowledge of the plaintiff, said car was old and leaky, thereby rain

and melted snow got through, in and upon said hay, and destroyed a portion to the amount and value of $29.66; that said shipment was along about January 1893.

This plaintiff further avers that of said 872 tons of hay, he tendered along in April, 1893, 27 tons for shipment to Central Bridge, New York; that the said defendant furnished plaintiff with cars for that purpose and received said hay aboard said cars and billed the same through to the said Central Bridge, New York, without change of cars; that without the knowledge or fault of the plaintiff, said cars were old and leaky and by reason thereof, rain and melted snow got in and upon said hay and destroyed a portion thereof to the amount and value of $76.39.

This plaintiff further alleges that he had tendered said 872 tons for shipment and demanded cars; that the defendant refused and neglected to furnish cars for a long period of time, to-wit: 60 days, and then furnished the plaintiff with 5 cars for shipment of 50 tons of hay, to the city of Philadelphia, and defendant received the same and billed the same through to the city of Philadelphia, but by reason of lying exposed at the defendant's station waiting for cars, said hay had become wet inside without the knowledge of the plaintiff and by reason of old and leaky cars furnished by the defendant rain and melted snow had got through and in and upon said hay whereby it became heated and entirely destroyed, which was of the value of $76.39; that said hay became wet and destroyed without the fault and knowledge of this plaintiff.

This plaintiff further avers that after he had tendered said hay for shipment and demanded cars, the defendant failed and neg-
311 lected for a long period of time to furnish cars, to-wit: for a period of 60 days; that between the time the plaintiff should have furnished cars to the time it did furnish cars the price of hay declined in the market $1.50 per ton and this plaintiff was compelled to sell and did sell said hay upon said declining market, losing thereby $1.50 per ton, to his damage in all $465.00, all without the fault or negligence of the plaintiff; that the market price of hay at the time the plaintiff demanded said cars and within a reasonable time thereafter was $7.50, when there was a decline of $1.50 as aforesaid; that said loss accrued entirely without the fault and negligence of this plaintiff, but through the fault and miscarriage, and neglect and refusal of defendant, as aforesaid, to furnish this plaintiff with cars within a reasonable time after such demand.

That of said 872 tons of hay, the plaintiff tendered for shipment and demanded cars to the city of Chicago, Illinois 10 tons of hay; that the said defendant, on the 11th day of December, 1892, furnished the plaintiff with a car and received said tons of hay and billed the same to the city of Chicago; that the same arrived in the city of Chicago on the 13th day of December, 1892; that defendant failed and neglected to put said car upon a side track in the city of Chicago where the same could be unloaded for a long period of time, to-wit: until January 24th, 1893, and by reason of said delay said

10 tons of hay became damaged and entirely worthless; that the same was of the value of $75.00, all of which occurred through the carelessness, negligence and fault of the defendant and without any fault whatever upon the part of the plaintiff.

This plaintiff further aver- that after he had tendered said
312 872 tons of hay for shipment and demanded cars, as aforesaid, the defendant failed and neglected and refused for a long period of time, to-wit: 90 days, to furnish cars and said hay was suffered and permitted to lie at the station of Marlborough, as aforesaid, along the track of defendant; that this plaintiff was compelled to and did employ a man to watch and take care of said property, to keep the same from being destroyed by fire and to protect the same from the weather, for a period of ninety days, for which he was compelled to pay and did pay a sum of $100.00 and this plaintiff was compelled to re-handle said hay, sort it, separating the damaged portion from the good at an expense of $25.00, all of which damages, to-wit: $125.00, was caused by and solely through the fault and neglect and refusal to furnish this plaintiff with cars, as aforesaid, and without any fault and neglect upon the part of plaintiff, to the plaintiff's damage in the sum of $125.00; that by reason of aforesaid acts of defendant, this plaintiff has been damaged in the sum of $4000, which are due and unpaid.

Wherefore, the plaintiff demands judgment against the defendant in the sum of four thousand dollars, and for all other, proper relief.

CHAS. C. SPENCER,
M. WINFIELD,
Att'ys for Pl'ff.

(Endorsed on back:) No. 26. State of Indiana, White county. White circuit court, February term, 1896. Patrick McGuire
313 *vs.* Louisville, New Albany & Chicago Railway Company. Amended complaint. Filed Feb. 11, 1896, F. B. Humston clerk. Charles C. Spencer, M. Winfield, att'ys for pl'ff.

Answer in McGuire v. L., N. A. & C.

The answer of the defendant, The Louisville, New Albany and Chicago Railway Company, the paper not being found among the files, it is admitted by the plaintiff in this case that The Louisville, New Albany and Chicago Railway Company appeared and filed an answer in general denial to the amended complaint.

314 (It is admitted that the Order Book No. 41 in the hands of counsel, is an order book of the White circuit court on file in the office of the clerk of the said court.)

Defendants offered in evidence Order Book No. 41, at page- 289 and 290, and the said pages of said order book being then read and given in evidence, were in the words and figures following, to-wit:

PATRICK MCGUIRE
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RY. CO. } 26.

Comes the plaintiff by C. C. Spencer and M. Winfield, his attorneys; comes also the defendant by W. S. Kinnan and Sellers and Uhl its attorneys; the defendant files separate demurrers to the second and third paragraphs of plaintiff's complaint, in these words to-wit: (insert) which demurrers the court overrules, to which ruling of the court, the defendant excepts; the defendant now files its answer to the second and third paragraphs of plaintiff's complaint in these words, to-wit (insert)

Whereupon, the issues being joined between the parties, by agreement of parties this cause is now submitted to the court for trial without the intervention of a jury.

The defendant requests that the court finds specially the facts and conclusions of law therein.

The court having heard the evidence now takes this cause under advisement until some future day of the term.

September Term, 1896, 15th Day, Sept. 23rd, 1896.

315 Defendants offered in evidence Order Book 41 of the White circuit court, at page 294 to 309 inclusive, and the said pages of the said order book being then read and given in evidence were in the words and figures following, to-wit:

September Term, 1896, 16th Day, Sept. 24th, 1896.

PATRICK MCGUIRE
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY. } 26. Def't, $2,416.33, and Costs. Int., 6%. Without Relief.

Come again the parties by counsel, and the court now files his special finding of facts and conclusions of law thereon as follows, to-wit:

Special Finding.

"STATE OF INDIANA, } ss:
White County, }

White Circuit Court, September Term, 1896.

PATRICK MCGUIRE
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

Special finding.

The court at the request of the defendant made at the proper time, makes the following special finding of facts, with its conclusions of law thereon.

1st. During the years of 1892 and 1893, and for several years prior thereto, the defendant, The Louisville, New Albany and Chicago Railway Company was a corporation organized under the laws of the State of Indiana, and was engaged in the business of a common carrier, and shipped straw hay and other kinds of farm pro-
316 ducts, and during all that period of time had a station along its line of railroad called Marlboro, Jasper county, Indiana: and the said defendant was a common carrier of freight, and carried all kinds of farm products from the said station of Marlboro to the city of Chicago, and from points in the State of Illinois, and to Louisville and other points in the State of Kentucky, and to Columbus and other points in the State of Ohio, and to Philadelphia, Lansdale, Newcastle and other points in the State of Pennsylvania, and to Cobleskill, New York city and other points in the State of New York; and it had its general freight office in the city of Chicago and the State of Illinois.

2nd. The main line of defendant's railroad during the years of 1892 and 1893, and for several years prior thereto, extended from the city of Chicago, Illinois, through the State of Illinois, and through the State of Indiana, to Louisville, Kentucky, and from Chicago, Illinois, to the city of Indianapolis, Indiana, and the station of Marlboro, Jasper county, Indiana, was a station for the shipment of freight consisting of all kinds of farm products.

3rd. The defendant during the years of 1892 and 1893, and for several years prior thereto, scheduled its freight rates without division into parts or interest to all the cities and towns named in special finding, and during that same period of time held itself out as a common carrier and shipper of hay, grain, and other farm products from the station of Marlboro to the points named in the finding, during all that time and advertised for freight business from said station of Marlboro to said points.

4th. The defendant during said years of 1892 and 1893 and for several years prior thereto, operated the sole and only line of
317 railway over which surplus farm products from the vicinity and station of Marlboro could be transported to market, and had such arrangements with connecting lines that no re-shipments, or re-billing of freight was required from the station of Marlboro, Jasper county, Indiana, to the cities of Chicago, Pittsburg, Lansdale, Philadelphia, Cobleskill and Central Bridge, and the defendant offered to enter into contracts with shippers to ship hay, and other farm products, from said station of Marlboro to said points upon certain scheduled rates without any change of cars, and at said period of time the plaintiff had knowledge that the defendant was thus holding itself out as a common carrier of hay and other farm products, from the said station of Marlboro and to points named, and relying upon said fact, engaged in the business of buying hay for shipment to the points named from the station of Marlboro, Jasper county, Indiana; and prepared himself with hay presses at or near the station of Marlboro, for the purpose of purchasing hay for shipment upon the defendant's road during the year of 1892, of which fact the defendant had knowledge that the plaintiff was thus induced to engage in the business of shipping hay.

5th. The plaintiff during the month of October, 1892, purchased in the vicinity of the station of Marlboro from farmers 872.81 tons of hay for shipment on the defendant's railroad from the station of Marlboro to Chicago in the State of Illinois, Pittsburg, Newcastle, Lansdale, Philadelphia, in the State of Pennsylvania, and Cobleskill and Central Bridge in the State of New York, and on the Atlantic sea-board, and during the fall of 1892, and the winter of 1893, used his hay presses for that purpose and pressed the hay thus purchased and had it hauled to the station of Marlboro
318 for shipment on the defendant's railroad, and delivered and tendered said 872.81 tons of hay to defendant at the station of Marlboro for shipment to the cities of Peoria, Chicago, in the State of Illinois, Pittsburg, Newcastle, Lansdale and Philadelphia in the State of Pennsylvania, and Cobleskill, Central Bridge in the State of New York, and Cincinnati in the State of Ohio, and the said hay at the time the same was delivered and tendered to the defendant for shipment was in good condition, and the plaintiff at the time of said delivery and tender demanded of the defendant cars for shipping the same. That such demands for cars were made daily during the months of December, 1892, and January, February and March 1893. That the defendant failed and refused to furnish the plaintiff with cars. The time such cars were demanded such hay was piled up near the tract of the defendant at the station of Marlboro at the places pointed out by the defendant's agent.

At that place the defendant had no storehouses or hay barns, in which to store the hay while waiting for shipment, and the plaintiff had no storehouse or barns at the station of Marlboro, in which to store hay thus delivered and tendered for shipment while waiting

for shipment, which fact was well known to the defendant, that while the hay was thus lying at the defendant's station awaiting shipment, and after it had been delivered by the plaintiff; the plaintiff to protect said hay from weather caused the same to be covered with canvass, which was the usual and only way of protecting the same against the weather, that this was the only means the plaintiff could use to protect said hay from the weather.

6th. The defendant upon demand for cars could have reasonably furnished cars within two days, to ship the hay as fast as
319 delivered and tendered by the plaintiff; that had the defendant furnished the cars within two days from the time they were demanded by the plaintiff, all of said hay could have been shipped to the points named, without the same in any manner being affected by exposure to the weather or from other cause.

7th. Of the 872.81 tons of hay herein found to have been delivered and tendered to the defendant for shipment, 600 tons hay at the station of Marlboro exposed to the weather after the same had been delivered and ready for shipment and the plaintiff had demanded cars to ship the same from 30 to 60 days but the defendant did not furnish or offer to furnish the plaintiff with cars to ship the same.

8th. Of the 600 tons herein found to have been delayed, after delivery and tender to the defendant for shipment for from 30 to 60 days by reason of the failure of the defendant to furnish cars, 242 tons of this hay became wet and by reason of rains and snows was destroyed and rendered valueless. The plaintiff during this time employed men to watch this hay, to keep the same covered with canvass, to protect the same from snows and rains. The defendant knew during all of said period of time the said hay was lying at the station of Marlboro and had been delivered and tendered for shipment, and that cars had been demanded. At the time the plaintiff demanded cars to ship said 600 tons of hay he notified the defendant that he wished suitable cars to ship said hay to the points hereinbefore named; that such hay became valueless and was destroyed by reason of its lying at the station of Marlboro exposed to the rains and snows; after the same had been delivered and tendered for shipment, and cars had been demanded. That there was no other reason for the destruction of said hay, than the failure and
320 neglect to furnish the plaintiff with cars upon the demand herein found. I further find that the plaintiff did not fail to use any efforts in his power to prevent said hay from being destroyed after the same had been delivered and tendered for shipment as aforesaid, and that the destruction of said hay was by reason of the failure and neglect of the defendant to furnish cars as herein found.

9th. I further find that there was no emergency calling for from the defendants an unusual amount of cars at the station of Marlboro or other station along its line, which disabled it to furnish the plaintiff with cars within a reasonable time after demand had been made,

and that the defendant had sufficient cars to ship the hay, grain and other farm products, from any station along its line within a reasonable time, after demand for cars, during the fall and winter of 1892 and the months of March and April, 1893.

10th. I further find, that when the plaintiff made his several demands for cars to ship said 600 tons of hay, the defendant promised to furnish the plaintiff with cars within a reasonable time.

11th. I further find that the plaintiff did not in any way contribute by any negligence of his to the loss of said hay.

12th. I further find that the said 242 tons of hay at the time the same was delivered and tendered for shipment was worth $1462.00.

13th. I find that the market value of said hay at the points, for which the plaintiff demanded cars to ship said hay at the time the demand was made, and the hay was delivered and tendered for shipment and within such time as said hay could reasonably
321 have been shipped, after deducting the costs of shipment or freight charges was, $1462.00.

14th. I further find that said 242 tons of hay was worth at the time it was delivered and tendered for shipment, and cars were demanded at the station of Marlboro $1462.00.

15th. The plaintiff at the time of delivery and tender of said hay for shipment, was ready and willing to pay the freight thereon, but it was the custom and rule of the company not to require pre-payment of freight, but the freight was paid by the consignee and charged up by him against the plaintiff which the plaintiff paid. These rules were well known to the plaintiff, and they were acted upon by him and the defendant.

16th. Of the 872.81 tons of hay tendered by the plaintiff to the defendant for shipment to the points named, 300 tons were detained at the station of Marlboro for a period of 60 days because of the failure and neglect of the defendant to furnish cars and while thus detained at the station the market price of the hay declined at the points of destination fifty cents per ton; and the defendant did not furnish the plaintiff with cars to ship said 300 tons of hay until after said decline in the market, and the plaintiff was compelled to and did ship said hay to the points of destination, and was compelled to and did sell the same upon said declining market, and thereby lost fifty cents per ton or $150.00.

17th. I further find that had the defendant furnished the plaintiff with cars when demanded, or within a reasonable time therefrom, to-wit: two days for shipping said 300 tons of hay, the same would have reached the point of destination before the decline in the market, but the loss to the plaintiff of said $150.00 was caused
322 wholly by the aforesaid failure and neglect of the defendant to furnish cars.

18th. After said hay was delivered and tendered to the defendant for shipment by the plaintiff, and while being detained at the station by reason of the failure of the defendant to furnish cars, the plaintiff was compelled to and did employ a watchman, or a man to

watch said hay and take care of the same, that the services of said man were worth $1.50 per day, which the plaintiff paid him for watching said hay, as it was exposed to the weather, and also exposed to fire by reason of passing engines; that he thus employed a man for 60 days and paid him therefor $90.00 and that the employment of said watchman was rendered necessary by reason of the aforesaid failure and neglect of the defendant to furnish cars to ship said hay, within a reasonable time after demand was made.

19th. I further find that on the 10th day of December, 1892, of the 872.81 tons herein found the plaintiff delivered and tendered to the defendant for shipment nine tons of hay to be shipped to G. S. Blakeslee & Co., Chicago, Illinois, and demanded a car for that purpose. I further find that on or about the 10th day of December, the defendant furnished the plaintiff with a car to ship said nine tons of hay, and the same was loaded aboard the car by the plaintiff on that day, and the same when loaded was in good condition, and was all prairie hay, that the defendant transported said car to the city of Chicago and it arrived there on the 13″ day of December, 1892, and was detained by the defendant at its yards, at Chicago until the 24″ day of January, 1893, before it was put upon the side-track for unloading, and when unloaded it was found that the hay had
323 become wet and damaged and entirely destroyed, and rendering it entirely valueless, that it was impossible for the plaintiff's consignee to unload said car until thus placed upon the side track, that the failure to put said car upon the side track for, unloading from the 13th day of December until the 24th day of January following, was by reason of the carelessness and negligence of the defendant or its employees, and was without any fault or negligence upon the part of the plaintiff; that had said car been put upon the side track for unloading within a reasonable time after it arrived in Chicago the said hay would have *it* arrived in good condition in the city of Chicago.

20th. I further find that the plaintiff was compelled to pay and did pay to the defendant the freight on the said nine tons of hay, at the rate of $1.20 per ton, that said hay was worth in the market in Chicago at the time it arrived there, and at the time it was unloaded, if it had arrived in good condition $8.50 per ton or in all, $76.50.

21st. I further find at the time of the shipment of said hay the defendant delivered to the plaintiff a bill of lading, in substance as follows:—

MARLBORO, IND., *Dec.* 10, 1892.

Received from Patrick Maguire the property described below, in apparent good order. Marked consigned and destined as indicated below which said Louisville, New Albany & Chicago Railway Company agrees to carry to said destination.

Description of articles:

Nine tons of hay

Consignees and destination:

G. S. Blakeslee & Co. Chicago, Ills.

324 And then and there entered into a contract with the plaintiff to ship said hay to Chicago and within a reasonable time, and in good order.

22nd. That by reason of said hay being damaged as herein found, the same became worthless and wholly without value, and the plaintiff received nothing therefor, and was lost to him.

Third paragraph.

I further find that the defendant entered into a contract in the fall — 1892, with the plaintiff, whereby it agreed to ship said 872.81 tons of hay on the following terms and conditions, to-wit: To Chicago at the rate of six cents per hundred pounds; to Cincinnati at the rate of ten cents per hundred pounds, to Pittsburg at the rate of fifteen cents per hundred pounds, to New York and points in the State of New York, at the rate of twenty-five cents per hundred pounds, to Peoria, Illinois at the rate of seven cents per hundred pounds.

23rd. I further find that the defendant furnished plaintiff with cars 76 cars of inferior size, which would not hold ten tons of hay, on the contrary they would average only nine tons of hay, that the plaintiff made objections to the defendant of the size of these cars, that he was informed by the agent of the defendant at Marlboro that they were the best cars he could get, that the defendant demanded and exacted of the consignees of the plaintiff, freight charges at the rate of ten tons per car, which the consignees were compelled to and did pay freight at the rate of ten tons per car, which consignees charged up to the plaintiff, and which the plaintiff was compelled to pay, and did pay thus and thereby the plaintiff was compelled to pay excessive freight as follows: On one car to Chicago
325 $1.20, 29 cars were shipped to Cincinnati, on which the plaintiff was thus compelled to pay and did pay for 29 tons extra at the rate of fifteen cents per ton amounting to $58.00, that he shipped 15 cars to Pittsburg, for which the defendant demanded and received pay as aforesaid at the rate of ten tons per car and the plaintiff was compelled as herein found to pay extra freight to the amount of 15 tons at the rate of $3.00 per ton, in all $45.00; of the seventy-six cars, thirteen were shipped to New York for which the defendant demanded and received and which the plaintiff was compelled to pay as herein found freight at the rate of ten tons per car, thus and thereby the plaintiff was compelled to pay, which was received by the defendant the thirteen tons of extra freight at the rate of $5.00 per ton, which would be $65.00; of the seventy-six cars sixteen were shipped to Peoria, Illinois, for which the defendant demanded and received, and this plaintiff was compelled to pay as herein found at the rate of ten tons per car, that the defendants thus received and the plaintiff compelled to pay excessive freight to the amount of sixteen tons at the rate of $1.40 per ton amounting in all, $22.40. That the defendant exacted from the plaintiff's con-

signees, above the contract price and received the same for freight, which the plaintiff was compelled to pay as herein found to the amount of $188.60.

24th. I further find that said payment of excessive freight by the plaintiff was not voluntary, and was paid as herein found.

25th. I further find that the defendant was not entitled to receive and demand such excessive freight.

Conclusions of Law upon the Foregoing Facts.

326 1st. I find the law to be as follows: The plaintiff is entitled to recover upon the first paragraph of his complaint the sum of $1702.00 *dollars* with interest thereon from the first day of June, 1893, amounting to $306.36 *dollars*, in all the sum of $2008.36 and judgment should be for the plaintiff for that amount.

2nd. I find that the plaintiff is entitled to recover from the defendant upon his second paragraph of complaint the amount of seventy-six dollars and fifty cents with interest thereon from the first day of January, 1893, amounting to $13.68 *dollars* in all $90.18 and judgment should be for plaintiff for amount.

3rd. I find that the plaintiff is entitled to recover from the defendant upon the third paragraph of his complaint the sum of one hundred and ninety-one dollars, with interest thereon from the first day of June, 1893, amounting to $36.38 *dollars* in all $227.98 *dollars* and judgment should be for plaintiff for that amount.

GEORGE BURSON,
Special Judge."

The defendant by counsel now excepts to each conclusion of law herein.

Upon his foregoing finding of facts and conclusions of law thereon, the court finds for the plaintiff; that there is due the plaintiff and from the defendant the sum of two thousand four hundred sixteen dollars and thirty three cents.

Judgment in McGuire v. L., N. A. & C.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the said sum of two thousand four hundred and sixteen dollars thirty three cents, with interest at the rate of six per cent. per annum together with his costs made, paid out and expended.

327 The defendant by counsel now files its motion in these words, to-wit: (insert) for a new trial of this cause.

The court now overrules the motion of defendant for a new trial

hereof; to which ruling of the court the defendant excepts and the defendant is given 90 days in which to file bond in the sum of three thousand dollars; and to file its bill of exceptions herein.

(On the margin of page 295 of the Order Book entry just read, appears the following)

"Notice is hereby given that I intend to hold a lien and do hold a lien on this judgment for my services as attorney herein for the plaintiff to the amount of thirteen hundred ($1300.00) dollars.

(Signed) CHAS. C. SPENCER."

328 Defendants offered in evidence the execution issued to the sheriff of Pulaski county, and the return of the sheriff thereon. (Identified by the reporter as Exhibit O.)

Plaintiff objected to the introduction of the return of the sheriff and the execution upon the grounds that the description contained in the sheriff's return of the levy make upon the real estate is so indefinite and uncertain as to constitute no description whatever, and that the pretended levy made upon the pretended property described is a nullity.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time excepted.

And the said execution and return of the sheriff being then read and given in evidence were in the words and figures following, to-wit:

EXHIBIT O.

STATE OF INDIANA, } *ss*:
White County, }

The State of Indiana to the sheriff of Pulaski county:

Whereas, Patrick Maguire, recovered judgment against The Louisville, New Albany and Chicago Railway Company—on the 24" day of September, 1896, in the White circuit court, for two thousand four hundred sixteen dollars and thirty three cents, and subject to redemption laws of 1861, became replevin bail on the — day of ——, 189–, upon which there is due two thousand four hundred sixteen dollars and thirty three cents principal, with six per cent. interest, and sixty eight dollars and sixty two cents costs accrued to this time.

You are therefore commanded to levy the said sums of money of the property of the defendant, The Louisville, New Albany
329 and Chicago Railway Company in your county subject to execution, and have the money at the clerk's office to satisfy said judgment, interest and cost, and return this writ within one hundred and eighty days, with your doings thereon.

Witness, the clerk of said court, and the seal thereof hereunto affixed, at my office this 16" day of October, 1897.

[SEAL.] F. B. HUMSTON, *Clerk*,
By —— ——, *Deputy*.

WINAMAC, INDIANA, *Oct. 18th*, 1897.

This writ of execution came to hand October 16th, 1897, and after a strict and careful search I found no personal property of the defendant within my bailiwick of any kind or nature on which to levy said execution and I then levied upon the following real estate as the property of the said defendant, in Pulaski county, Indiana, described as follows, to-wit: Commencing at the north west corner of lot 12 in block 9 in the town of Francesville, in Pulaski county, Indiana, thence west with the south line of Yellow street to the west line of Bill street to the place of beginning, thence west with the south line of Yellow street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago railroad, thence south with the east line of said right of way 190 feet, thence east, parallel with the south line of said Yellow street to the west line of Bill street, thence north with the west line of Bill street to Yellow street to the place of beginning.

Also commencing at the south west corner of lot 7 in block 9 in said town thence west to the west line of Bill street to the place of beginning, thence west with the north line of Montgomery
330 street to a point 5 feet east of the east line of the right of way of said rail road, thence north parallel with said right of way 66 feet to post, thence east parallel with the north line of Montgomery street to the west line of Bill street, thence south with the west line of Bill street to Montgomery street to the place of beginning.

Also commencing at the northwest corner of lot 12 in block 14, thence west with the south line of Montgomery street to the west line of Bill street to the place of beginning, thence west with the south line of Montgomery street to a point 30 feet east of the east line of the right of way of said railway company, thence south, parallel with the east line of said right of way to James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street to the south line of Montgomery street to the place of beginning.

Also commencing at a point at the northwest corner of lot 12 in block No. 22, thence west with the south line of James street to the west line of Bill street at the place of beginning, thence west with the south line of James street to the east line of the right of way of said railway thence south with the east line of said right of way to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street to the south line of James street to the place of beginning, all of said land being in the town of Francesville, in Salem township, in Pulaski county, in the State of Indiana and immediately after making my said levy on said real estate I caused the same to be appraised by E. H. Applegate and J. A. Engle, both of whom are resident householders and freeholders of said town of Francesville of the township of Salem, county of Pulaski and
331 State of Indiana, the town, township, county and State within which said real estate is situated, which said appraisement of

said real estate was appraised in parcels, reduced in writing and is filed herewith as part of this, my return of said execution.

And on the 22nd day of October, 1897, in pursuance to the command of this execution I advertised the real estate herein described for sale at the court house door of Pulaski county, Indiana, on the 13th day of November, 1897 by publication in the Pulaski County Democrat, a weekly newspaper of general circulation printed and published in the town of Winamac, in said town and county and nearest to where said real estate is situated for more than three weeks successively, immediately before the day of sale and by posting up a printed notice thereof at the court house door of said county and by posting up like notices thereof at three public places in the town of Francesville, in the township of Salem, in said county, the township in which said real estate is situated, which was done more than twenty days immediately preceding the day of sale, a copy of said notice being hereunto attached and made a part of this return.

And on the day set for the sale of said real estate, to-wit: November 13th., 1897, between the hours of 10 o'clock a. m. and 4 o'clock p. m. at the court house door of said county, I first offered to the highest and best bidder, for cash in hand, the rents and profits of all that portion of said real estate of the following description, to-wit: Commencing at the northwest corner of lot 12 in block 9 in the town of Francesville, in Pulaski county, Indiana, thence west, parallel with Yellow street in said town, 50 feet to a point on the west line of Bill street at the place of beginning, thence west, parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville,
332 New Albany and Chicago Railway Company, thence south with the east line of said right of way 190 ft. to a post, thence east, parallel with the south line of Yellow street 150 feet to the west line of Bill street thence north with the west side of Bill street, 190 feet to the place of beginning (which said described land I will hereinafter refer to in this return and designate it as "tract No. 1"), for a period not exceeding seven years, by the year, and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash in hand, the rents and profits of all that portion of said real estate of the following description, to-wit—all that portion thereof, commencing at the south west corner of lot 7 in block 9 in said town, thence west with the north line of Montgomery street, to the west line of Bill street at the place of beginning thence west with the north line of said Montgomery street to a post at a point 5 feet east of the east line of the right of way of said rail way company, thence north, parallel with the east line of said right of way 66 feet, thence east parallel with the north line of said Montgomery street to the west line of said Bill street, thence south with the west line of Bill street to the place of beginning (which tract last above described I shall hereinafter refer to in this return and designate as tract No. 2), for a period not exceeding seven years, by the year,

and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash in hand, the rents and profits of all that portion of said real estate of the following description, to-wit:—

Commencing at the north west corner of lot 12 in block 14 in said town, thence west with the south line of Montgomery street, to the west line of Bill street to a post at the place of beginning, thence west with the south line of Montgomery street to a point 30
333 feet east of the east line of the right of way of said railway company, thence south parallel with the east line of said right of way 360 feet to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street to the place of beginning (which tract last above described I shall, in this return, hereinafter refer to and designate as "tract No. 3," for a period not exceeding seven years, by the year, and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash, the rents and profits of all that portion of said real estate of the following description, to-wit:—

Commencing at the north west corner of lot 12 in block 22 in said town, thence west with the south line of James street to the west line of Bill street to the place of beginning, thence west with the south line of James street to the east line of the right of way of the said rail way company, thence south with the east line of said right of way to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street to the south line of James street at the place of beginning, which tract of land last above described I shall, in this return, hereinafter refer to and designate as "tract No. 4," and receiving no bids therefor I did then and there offer the rents and profits of tracts Nos. one and two for a period not exceeding seven years, by the year, for cash in hand, to the highest and best bidder and receiving no bid therefor I then and there offered to the highest and best bidder for cash in hand the rents and profits of tracts Nos. 1–2 & 3 for a period not exceeding seven years, by the year and receiving no bid therefor I then and there offered to the highest and best bidder for cash in hand, the
334 rents and profits — tracts Nos. 1–2–3 & 4 for a period not exceeding seven years and receiving no bids therefor I then and there offered to the highest and best bidder for cash in hand the fee simple right of the defendant of, in and to tract No. 1 of said real estate and receiving no bid therefor I did then and there offer to the highest and best bidder for cash the fee simple right of the defendant of, in and to tracts Nos. 1 and 2 of said real estate and receiving no bid therefor I did then and there offer the fee simple right of the defendant of, in and to tracts Nos. 1–2 & 3 of said real estate and receiving no bid therefor I did then and there offer to the highest and best bidder for cash in hand the fee simple right of the defendant company in and to any two of said tracts and receiv-

ing no bid therefor I did then and there offer to the highest and best bidder for cash in hand the fee simple right of the defendant company of, in and to any three of said tracts and receiving no bid therefor I did then and there offer the fee simple right of the defendant company in and to tracts Nos. 1–2–3 & 4, being all of said described real estate and Medary M. Hathaway bid therefor the sum of two thousand dollars ($2,000) and that being the highest and best bid then and there offered and the same being more than two-thirds of the appraised value thereof the same was openly struck off and sold to said Medary M. Hathaway for the sum of two-thousand dollars ($2,000.00), there being present at and during all the time of said sale more than three competent bidders; and the said purchaser having paid over to me the amount so bid by him, I did then and there execute to him my certificate of purchase, bearing even date herewith.

I then paid over to the plaintiff, as per his receipt herewith and hereon eighteen hundred fifty one and 33/100 dollars. I paid over to the clerk of White county sixty nine and 87/100
335 dollars original costs and have retained fifty two and 80/100 dollars, my fees. Paid over to J. J. Gorrell, printer, twenty two dollars, his fees, as per his receipt hereon. Paid to E. H. Applegate two dollars his fees as appraiser as per his receipt hereon and paid to J. A. Engle his fees as appraiser ($2 00) as per his receipt hereon, and hereby return this writ of execution unsatisfied as to the balance due thereon, having found no other property of the defendant company subject to execution within my bailiwick.

PHILLIP DELLINGER,
Sheriff Pulaski County.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger, sheriff, two dollars, my fees in full as appraiser in the above cause.

J. A. ENGLE.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger, sheriff, two dollars, my fees in full for services as appraiser in above cause.

E. H. APPLEGATE.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger, sheriff, twenty two dollars, my fees in full for publishing notice of sheriff's sale in McGuire *vs.* L. N. A. & C. Ry. Co.

J. J. GORRELL.

336

WINAMAC, IND., *Nov.* 13, 1897.

Received of Philip Dellinger, sheriff Pulaski county, eighteen hundred fifty one and 33/100 dollars to apply on above judgment.

PATRICK McGUIRE,
By WINFIELD, SPENCER & STEIS &
HATHAWAY, *P'ff's Att'ys.*

(Copy of notice.)

Sheriff's Sale.

By virtue of an execution to me directed from the clerk of the White circuit court, I will expose at public sale to the highest bidder, on Saturday, November 13, 1897, between the hours of ten o'clock a. m. and four o'clock p. m. of said day, at the door of the court house in Pulaski county, Indiana, the rents and profits, for a term not exceeding seven years, of the following described real estate, to-wit:

Commencing at the northwest corner of lot No. twelve (12) in block No. nine (9) in the town of Francesville, in Pulaski county, in the State of Indiana, thence west parallel with the south line of Yellow street in said town fifty (50) feet to a post on the west line of Bill street at the place of beginning: thence west parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way one hundred and ninety (190) feet to a post, thence east parallel with the south line of said Yellow street to the west line of Bill street, thence north with the west line of said Bill street one hundred and ninety (190) feet to the south line of Yellow street at the place of beginning. Appraised at $600.00.

337 Also commencing at the south west corner of lot No. seven (7) in block No. nine (9) in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six (66) feet to a post, thence east parallel with the north line of said Montgomery street to the west line of Bill street thence south with the west line of Bill street sixty-six (66) feet, to the place of beginning. Appraised at $600.00.

Also commencing at the north west corner of lot No. twelve (12) in block No. fourteen (14) in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line

of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way three hundred and sixty (360) feet to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of Montgomery street, to the place of beginning, appraised at $1,200.00.

Also—commencing at the northwest corner of lot No. twelve (12) in block No. twenty-two (22) in said town, thence west with the south line of James street to the west line of Bill street to a post at the place of beginning: thence west with the south line of
338 James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of James street, to the place of beginning, appraised at $600.00.

All the above described tracts of land being in the town of Francesville, in Pulaski county, in the State of Indiana.

And in case the rents and profits fail to bring the amount demanded, to satisfy the decree aforesaid, interest and costs, together with accruing costs, I will at the same time and place and in like manner as aforesaid, offer for sale at public auction and outcry, to the highest bidder, all the right, title, interest and estate in fee simple of the Louisville, New Albany and Chicago Railway Company in and to the above described real estate, or so much and such part thereof as may be necessary to satisfy the decree aforesaid, which is in favor of Patrick McGuire and against the Louisville, New Albany and Chicago Railway Company.

Said sale will be made subject to relief from the valuation and appraisement laws of the State of Indiana at not less than two-thirds (⅔) the appraised value thereof.

PHILIP DELLINGER,
Sheriff Pulaski County, Ind.

Oct. 22, '97.

STEIS & HATHAWAY, *Attorneys.*

339 (Endorsed on back:) Returnable 180 days from Oct., 16″ 1897. White circuit court. Patrick Maguire. *vs.* L. N. A. & C. Ry. Co., Execution. Date of judgment. September, 24″, 1896.—Repleviable and collectible without. relief.

Amount of judgment	$2416.33
Amount of costs	68.62
This writ, filing etc	1.25

O. B. No. 41. Page 294.
F. B. No. 19. Page 152.
Judg. dock. No. 10. Page 228.
Ex. doc. No. 17. Page 225.

Chas. C. Spencer, attorney for plaintiff. Filed Dec. 1, 1897. F. B. Humston clerk.

340 *Levy by Virtue of Execution.*

White County Circuit Court, September Term, 1896.

PATRICK MCGUIRE
against
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

The following is a list of property levied upon by virtue of an execution in this case, by me Philip Dellinger sheriff of Pulaski county, Ind. on this 18th day of October 1897, to-wit:

	Appraisement. Dollars.	Cents.
Commencing at the north west corner of lot No. 12 in block No. 9 in the town of Francesville in Pulaski county, Indiana, thence west parallel with the south line of Yellow street in said town fifty feet to a post on the west line of Bill street in said town, said post being at the place of beginning, thence west parallel with the south line of Yellow street in said town to a post at the east line of right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with said east line of said right of way 190 feet to a post, thence east parallel with the south line of said Yellow street to the west line of said Bill street, thence north parallel with the west line of said Bill street 190 feet to the place of beginning.	$600.00.	

Also—

Commencing at the south west corner of lot seven (7) in block nine (9) in said town thence west
341 with the north line of Montgomery street in said town to the west line of Bill street to a post at the place of beginning, thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six feet (66 ft.) to post, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with the west line of Bill street sixty six (66) feet to the place of beginning. $600.00.

Also—

Commencing at the north west corner of lot twelve (12) in block fourteen (14) in said town of Francesville, thence west with the south line of Montgomery street to a post on the west line of Bill street at the place of beginning, thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of the right of way of what was formerly known as the Louisville, Chicago and New Albany Railway Company, thence south parallel with the east line of said right of way three hundred sixty feet (360) to the north line of James street, thence east with the north line of James street to the west
342 line of Bill street, thence north parallel with the west line of Bill street three hundred sixty feet (360) to the place of beginning at south line of Montgomery street. $1200.00.

Also—

Commencing at the north west corner of lot No. twelve (12) in block twenty-two (22) in said town of Francesville, thence west with the south line of James street to a post at the west line of Bill street at the place of beginning, thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred sixty feet (360) to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street, three hundred sixty feet (360) to the south line of James street at the place of beginning.	$600.00.

All the above described tracts of lands being in the town of Francesville in Pulaski county, in the State of Indiana.

We, the undersigned, selected to appraise the property mentioned in the schedule to which this is annexed, upon oath say that the several items, to the best of our judgment, are worth the respective sums specified therein, and that the same is a fair cash
343 value at this time (exclusive of liens and incumbrances.)

JOSEPH A. ENGLE,
E. H. APPLEGATE,
Appraisers.

Subscribed and sworn to before me, this 20th day of October 1897.

PHILIP DELLINGER,
Sheriff Pulaski Co.

(Endorsed on back:) Patrick MaGuire *vs.* L. N. A. & C. Ry. Co. Levy by virtue of execution. Joseph A. Engle, E. H. Ap-legate appraisers. Filed Dec. 1, 1897. F. B. Humston, clerk.

Sheriff's Deed.

Defendants offered in evidence the sheriff's deed. (Identified by the reporter as Exhibit P.)

Plaintiff objected to the introduction of the sheriff's deed, for the reason that the description is so indefinite and uncertain as to render the conveyance void; the description does not on itself furnish the data for fixing the boundary lines, and does not refer to any other instrument or proceeding for the purpose of fixing the boundary lines of the land described. The court overruled the objection, to

which ruling of the court the plaintiff, at the time, excepted. And the said sheriff's deed being then read and given in evidence,
344 was in the words and figures following, to-wit:

EXHIBIT P.

This indenture, made this 22nd day of November, 1898 between Philip Dellinger, sheriff of Pulaski county, in the State of Indiana, of the first part, and Medary M. Hathaway of the county of Pulaski and State of Indiana of the second part, witnesseth:

That whereas, at the September term A. D. 1896 of the circuit court of White county, Indiana, Patrick McGuire as plaintiff recovered judgment by said court in a certain action therein against The Louisville, New Albany and Chicago Railway Company as defendant for two thousand four hundred and sixteen dollars and thirty three cents for his damages, and also the sum of sixty nine dollars and eighty seven cents for his costs in that behalf expended; all without any relief whatever from valuation or appraisement laws, as by the record thereof remaining in said court more fully appears.

And whereas, afterwards, to-wit: on the 16th day of October A. D. 1897, a writ of execution was duly issued, upon said judgment and under the seal of said court, attested by the clerk thereof, which was directed to the sheriff of the county of Pulaski by which writ said sheriff was commanded to levy the said sum of money of the property of the defendant, in said county, subject to execution, and that he should have those moneys at the clerk's office, according to law, to satisfy said judgment, interests and costs, and also, should, in like manner, make and return all interests and accruing costs thereon and that he should made due return of that writ to the clerk's office at the expiration of one hundred and eighty days from the date of the same.

345 And whereas, said writ of execution on the — day of ——, A. D. 1897, came to the hands of Philip Dellinger then the sheriff of said county to be executed, and he, as such sheriff on the — day of —— A. D. 18—, levied said writ of execution upon the following real estate in the county of Pulaski in the State of Indiana, to-wit:

Commencing at the northwest corner of lot No. twelve (12) in block No. nine (9) in the town of Francesville, in Pulaski county, in the State of Indiana, thence west parallel with the south line of Yellow street in said town fifty (50) feet to a post on the west line of Bill street at the place of beginning; thence west parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way one hundred and ninety (190) feet to a post, thence east parallel with the south line of said Yellow street to the west line of Bill street, thence north with the west line of said Bill street

one hundred and ninety (190) feet to the south line of Yellow street at the place of beginning.

Also—commencing at the southwest corner of lot No. seven (7) in block No. nine (9) in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six (66) feet to a post, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with the west line of Bill street sixty-six (66) feet, to the place of beginning.

346 Also—commencing at the northwest corner of lot No. twelve (12) in block No. fourteen (14) in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way three hundred and sixty (360) feet to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of Montgomery street, to the place of beginning.

Also—commencing at the northwest corner of lot No. twelve (12) in block No. twenty-two (22) in said town, thence west with the south line of James street to the west line of Bill street to a post at the place of beginning; thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of James street, to the place of beginning.

All the above described tracts of land being in the town of Francesville, in Pulaski county, in the State of Indiana.

And the said Philip Dellinger as sheriff aforesaid, having legally advertised the same, did, on the 13th day of November A. D.

347 1897, at the court house door in Winamac in the county aforesaid, between the hours prescribed by law, at public auction, first expose to sale the rents and profits for a term not exceeding seven years, of said estate of the said The Louisville, New Albany and Chicago Railway Company in and to said real estate and no person bidding for the same, he then offered at public auction aforesaid, all the rights, title and interest in fee simple of the said Louis-

ville, New Albany and Chicago Railway Company in and to said estate, and the said Medary M. Hathaway did then and there bid the sum of two thousand dollars and no cents, and no person bidding more, the same was in due form openly struck off to the said Medary M. Hathaway for the said sum of two thousand dollars and no cents he being the highest and best bidder and that being the highest price bid for the same.

And whereas, also on said 13th day of November 1897, as required by law, said sheriff executed to said purchaser a certificate setting forth the foregoing facts, with the condition appended that if said premises were not redeemed within one year from the date thereof, by payment of the purchase money, with eight per centum interest thereon by said judgment defendant Louisville, New Albany and Chicago Railway Company heirs or assigns to said purchaser its heirs or assigns, said Medary M. Hathaway would be entitled to a deed of conveyance thereof.

Two dollars internal revenue stamps, properly cancelled.

Therefore, to confirm to said Medary M. Hathaway the sale so made as aforesaid, the said Philip Dellinger as sheriff as aforesaid, in consideration of said sum of two thousand dollars and no cents, to him in hand paid by said Medary M. Hathaway the receipt
348 whereof is hereby acknowleged hath granted, bargained and sold, and doth by these presents grant, bargain, sell, convey and confirm, to the said Medary M. Hathaway, his heirs and assigns forever, all the following real estate, situate in the county of Pulaski and State of Indiana, to-wit:

Commencing at the northwest corner of lot No. twelve (12) in block No. nine (9) in the town of Francesville, in Pulaski county, in the State of Indiana; thence west parallel with the south line of Yellow street in said town fifty (50) feet to a post on the west line of Bill street at the place of beginning: thence west parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way one hundred and ninety (190) feet to a post, thence east parallel with the south line of said Yellow street to the west line of Bill street, thence north with the west line of said Bill street one hundred and ninety (190) feet to the south line of Yellow street at the place of beginning.

Also—commencing at the southwest corner of lot No. seven (7) in block No. nine (9) in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of beginning: thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six (66) feet to a post, thence east par-

allel with the north line of said Montgomery street to the west line of Bill street, thence south with the west line of Bill street sixty-six (66) feet, to the place of beginning.

Also—commencing at the northwest corner, of lot No. twelve
349 (12) in block No. fourteen (14) in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning: thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way three hundred and sixty (360) feet to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line o- Bill street three hundred and sixty (360) feet to the south line of Montgomery street, to the place of beginning.

Also—commencing at the northwest corner of lot No. twelve (12) in block No. twenty-two (22) in said town, thence west with the south line of James street to the west line of Bill street to a post at the place of beginning: thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of James street, to the place of beginning.

To have and to hold, all and singular, the premises aforesaid, with the privileges and appurtenances, to the said Medary M. Hathaway heirs and assigns forever. in as full and ample a manner as the same was held by the said The Louisville, New Albany and Chicago Railway Company immediately before the levying of the aforesaid execution.

In witness whereof, the said Philip Dellinger as sheriff as
350 aforesaid, has hereunto set his hand and seal, the day and year first above written.

PHILIP DELLINGER. [SEAL.]

STATE OF INDIANA, } *sct:*
Pulaski County, }

Before me, John W. Morrow, a notary public in and for said county, personally came Philip Dellinger, sheriff of said county, and acknowledged the foregoing conveyance to be his voluntary act and deed, as such sheriff.

In witness whereof, I have hereunto subscribed my name, and affixed my notarial seal of office, this 22nd, day of November 1898.

[SEAL.] JOHN W. MORROW,
Notary Public.

(Endorsed on back:) 876 Philip Dellinger sheriff Pulaski county, to Medary M. Hathaway Deed on execution. Received for record, the 19 day of Dec. A. D., 1898, at 8 o'clock a. m., and recorded in Record 64 pages 402 to 407 W. H. Oliver recorder of Pulaski
351 county. Duly entered for taxation. Dec. 19 1898 J. N. Hayworth auditor. Fees $40/100 p'd. 1.50 p'd.

Transcript of Judgment, McGuire v. L., N. A. & C.

Defendants offered in evidence a transcript of the judgment in the case of Patrick Maguire *vs.* The Louisville, New Albany & Chicago Railway Company, filed in the Pulaski circuit court, the following file mark being admitted by the plaintiff, and formal proof thereof dispensed with, to-wit: "Filed and recorded January 26″ 1897 at 10 o'clock p. m. of said day, Jno. C. Jones, clerk Pulaski circuit court." (Identified by the reporter as Exhibit Q.)

And the said transcript of judgment being them read and given in evidence was in the words and figures following, to-wit:

EXHIBIT Q.

Transcript to Bind Real Estate.

Be it remembered, that at a term of the circuit court of White county Indiana, begun and held at the court house in the town of Monticello, in said county, commencing on the 1st Monday being the 7″ day of September 1896.—said term being held in pursuance of law; present the Honorable Truman F. Palmer, sole judge of said court, F. B. Humston clerk thereof and Simon U. Dobbins sheriff of said county, and afterwards on the 16″ judicial day of said term being the 24″ day of September, 1896, present the Honorable Geo. Burson, special judge, heretofore appointed, F. B. Humston clerk and Simon U. Dobbins, sheriff of said county the following proceedings were had to-wit:—

352 PATRICK MCGUIRE
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

Come again the parties by counsel, and the court now files his special finding of facts and conclusions of law thereon as follows; to-wit:

STATE OF INDIANA, } ss:
White County, }

White Circuit Court, September Term, 1896.

PATRICK MCGUIRE
vs.
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

Special Finding.

The court at the request of the defendant made at the proper time, makes the following special finding of facts, with its conclusions of law thereon.

1st. During the years of 1892 and 1893 and for several years prior thereto, the defendant, The Louisville, New Albany and Chicago Railway Company was a corporation organized under the laws of the State of Indiana, and was engaged in the business of a common carrier, and shipped straw, hay and other kinds of farm products, and during all that period of time had a station along its line of railroad called Marlboro, Jasper county, Indiana. And the said defendant was a common carrier of freight, and carried all kinds of farm products from the said station of Marlboro to the city of Chicago, and from points in the State of Illinois, and to Louisville and other points in the State of Kentucky, and to Columbus and other points in the State of Ohio, and to Philadelphia, Lansdale
353 Newcastle and other points in the State of Pennsylvania, and to Cobleskill, New York city and other points in the State of New York; and it had its general freight office in the city of Chicago and the State of Illinois.

2nd. The main line of the defendant's railroad during the years of 1892 and 1893 and for several years prior thereto, extended from the city of Chicago, Illinois, through the State of Illinois, and through the State of Indiana, to Louisville Kentucky, and from Chicago Illinois to the city of Indianapolis Indiana, and the station of Marlboro, Jasper county, Indiana, was a station for the shipment of freight consisting of all kinds of farm products.

3rd. The defendant during the years 1892 and 1893 and for several years prior thereto, scheduled its freight rates without division into parts or interest to all the cities and towns named in special finding, and during that same period of time held itself out as a common carrier and shipper of hay, grain, and other farm products from the station of Marlboro to the points named in the finding during all that time and advertised for freight business from said station of Marlboro to said points.

4th. The defendant during said years of 1892 and 1893 and for several years prior thereto operated the sole and only line of railway over which surplus farm products from the vicinity and station of

Marlboro could be transported to market, and had such arrangements with connecting lines that no re-shipments, or re-billing of freight was required from the station of Marlboro, Jasper county, Indiana to the cities of Chicago, Pittsburg, Lansdale, Philadelphia, Cobleskill, and Central Bridge, and the defendant offered to enter into contracts with shippers to ship hay and other farm products from said station of Marlboro to said points upon certain
354 scheduled rates without any change of cars, and at said period of time the plaintiff had knowledge that the defendant was thus holding itself out as a common carrier of hay and other farm products, from the said station of Marlboro and to points named, and relying upon said fact, engaged in the business of buying hay for shipment to the points named from the station of Marlboro, Jasper county, Indiana; and prepared himself with hay-presses, at or near the station of Marlboro, for the purpose of purchasing hay for shipment upon the defendant's road during the year of 1892, of which fact the defendant had knowledge that the plaintiff was thus induced to engage in the business of shipping hay.

5th. The plaintiff during the month of October, 1892, purchased in the vicinity of the station of Marlboro from farmers 872.81 tons of hay for shipment on the defendant's railroad from the station of Marlboro to Chicago in the State of Illinois; Pittsburg, Newcastle, Lansdale, Philadelphia, in the State of Pennsylvania, and Cobleskill and Central Bridge in the State of New York and on the Atlantic sea-board, and during the fall of 1892 and the winter of 1893 used his hay-presses for that purpose and pressed the hay thus purchased and had it hauled to the station of Marlboro for shipment on the defendant's railroad, and delivered and tendered said 872.81 tons of hay to the defendant at the station of Marlboro for shipment to the cities of Peoria, Chicago in the State of Illinois, Pittsburg, Newcastle, Lansdale and Philadelphia in the State of Pennsylvania, and Cobleskill, Central Bridge in the State of New York, and Cincinnati in the State of Ohio, and the said hay at the time the same was delivered and tendered to the defendant for shipment was in good condition, and the plaintiff at the time of said delivery and tender demanded of the defendant cars for shipping the same. That such demands for cars were made
355 daily during the months of December, 1892, January, February and March 1893. That the defendant failed and refused to furnish the plaintiff with cars. The time such cars were demanded such hay was piled up near the track of the defendant at the station of Marlboro at the places pointed out by the defendant's agent.

At that place the defendant had no storehouses or hay barns in which to store the hay while waiting for shipment, and the plaintiff had no storehouse or barns at the station of Marlboro in which to store hay thus delivered and tendered for shipment, while waiting for shipment, which fact was well known to the defendant; that while the hay was thus lying at the defendant's station awaiting shipment, and after it had been delivered by the plaintiff; the

plaintiff to protect said hay from weather caused the same to be covered with canvass, which was the usual and only way of protecting the same against the weather, that this was the only means the plaintiff could use to protect said hay from the weather.

6th. The defendant upon demand for cars could have reasonably furnished cars within two days, to ship the hay — fast as delivered and tendered by the plaintiff, that had the defendant furnished the cars within two days from the time they were demanded by the plaintiff all the said hay could have been shipped to the points named, without the same in any manner being affected by exposure to the weather or from other cause

7th. Of the 872.81 tons of hay herein found to have been delivered and tendered to the defendant for shipment, 600 tons hay at the station of Marlboro exposed to the weather after the same had been delivered and ready for shipment and the plaintiff had demanded cars to ship the same from 30 to 60 days but the defendant did not furnish or offer to furnish the plaintiff with cars to ship the same.

8th. Of the 600 tons herein found to have been delayed, after
356 delivery and tender to the defendant for shipment for from 30 to 60 days by reason of the failure of the defendant to furnish cars, 242 tons of this hay became wet and by reason of rains and snows was destroyed and rendered valueless. The plaintiff during this time employed men to watch this hay, keep the same covered with canvass, to protect the same from snows and rains. The defendant knew during all of said period of time the said hay was lying at the station of Marlboro, and had been delivered and tendered for shipment, and that cars had been demanded. At the time the plaintiff demanded cars to ship said 600 tons of hay he notified the defendant that he wished suitable cars to ship said hay to the points hereinbefore named; that such hay became valueless and was destroyed by reason of its lying at the station of Marlboro exposed to the rains and snows; after the same had been delivered and tendered for shipment, and cars had been demanded, that there was no other reason for the destruction of said hay, than the failure and neglect to furnish the plaintiff with cars upon the demand herein found. I further find that the plaintiff did not fail to use any efforts in his power to prevent said hay from being destroyed after the same had been delivered and tendered for shipment as aforesaid, and that the destruction of said hay was by reason of the failure and neglect of the defendant to furnish cars as herein found.

9th. I further find that there was no emergency calling for from the defendants an unusual amount of cars at the station of Marlboro, or other station along its line, which disabled it to furnish the plaintiff with cars within a reasonable time after demand had been made and that the defendant had sufficient cars to ship the hay grain and other farm products, from any station along its line within a rea-
sonable time after demand for cars, during the fall of 1892
357 and the months of March and April 1893.

10th. I further find, that when the plaintiff made his sev-

eral demands for cars to ship said 600 tons of hay the defendant promised to furnish the plaintiff with cars within a reasonable time.

11th. I further find that the plaintiff did not in any way contribute by any negligence of his to the loss of said hay.

12th. I further find that the said 242 tons of hay at the time the same was delivered and tendered for shipment was worth $1462.00.

13th. I find that the market value of said hay at the points, for which the plaintiff demanded cars to ship said hay at the time the demand was made, and the hay was delivered and tendered for shipment and within such time as said hay could reasonably have been shipped, after deducting the costs of shipment or freight charges was $1462.00.

14th. I further find that said 242 tons of hay was worth at the time it was delivered and tendered for shipment, and cars were demanded at the station of Marlboro, $1462.00.

15th. The plaintiff at the time of delivery and tender of said hay for shipment was ready and willing to pay the freight thereon, but it was the custom and rule of the company not to require pre-payment of freight but the freight was paid by the consignee and charged up by him against the plaintiff, which the plaintiff paid. These rules were well known to the plaintiff, and they were acted upon by him and the defendant.

16th. Of the 872.81 tons of hay tendered by the plaintiff to the defendant for shipment to the points named, 300 tons were detained at the station of Marlboro for a period of 60 days because of the failure and neglect of the defendant to furnish cars and while thus detained at the station the market price of the hay declined
358 at the points of destination 50 cents per ton; and the defendant did not furnish the plaintiff with cars to ship said 300 tons of hay until after said decline in the market, and the plaintiff was compelled to and did ship said hay to the points of destination, and was compelled to and did sell the same upon said declining market, and thereby lost fifty cents per ton or $150.00.

17th. I further find that had the defendant furnished the plaintiff with cars when demanded, or within a reasonable time therefrom, towit, two days for shipping said 300 tons of hay the same would have reached the point of destination before the decline in the market, but the loss to the plaintiff of said $150.00 was caused wholly by the aforesaid failure and neglect of the defendant to furnish cars.

18th. After said hay was delivered and tendered to the defendant for shipment by the plaintiff, and while being detained at the station by reason of the failure of the defendant to furnish cars, the plaintiff was compelled to and did employ a watchman, or a man to watch said hay and take care of the same; that the services of said man were worth $1.50 per day, which the plaintiff paid him for watching said hay, as it was exposed to the weather, and also exposed to fire by reason of passing engines, that he thus employed a

man for 60 days and paid him therefor $90.00 and that the employment of said watchman was rendered necessary by reason of the aforesaid failure and neglect of the defendant to furnish cars to ship said hay, within reasonable time after demand was made.

19th. I further find that on the 10" day of December 1892 of the 872.81 tons herein found the plaintiff delivered and tendered to the defendant for shipment (9) nine tons of hay to be shipped to G. S. Blakeslee & Co., Chicago, Illinois and demanded a car for that purpose. I further find that on or about the 10" day of
359 December the defendant furnished the plaintiff with a car to ship said nine tons of hay, and the same was loaded aboard the car by the plaintiff on that day and the same when loaded was in good condition, and was all prairie hay; that the defendant transported said car to the city of Chicago and it arrived there on the 13" day of December 1892 and was detained by the defendant at its yards, at Chicago until the 24" day of January 1893 before it was put upon the side track for unloading, and when unloaded it was found that the hay had become wet and damaged and entirely destroyed, and rendering it entirely valueless, that it was impossible for the plaintiff's consignee to unload said car until thus placed upon the side track, that the failure to put said car upon the side track for unloading from the 13" day of December until the 24" day of January following, was by reason of the carelessness and negligence of the defendants or its employees, and was without any fault or negligence on the part of the plaintiff; that had said car been put upon the side track for unloading within a reasonable time after it arrived in Chicago the said hay would have arrived in good condition in the city of Chicago.

20th. I further find that the plaintiff was compelled to pay and did pay to the defendant the freight on the said nine tons of hay at the rate of $1.20 per ton, that said hay was worth in the market in Chicago at the time it arrived there and the time it was unloaded, if it had arrived in good condition $8.50 per ton or in all $76.50.

21st. I further find at the time of the shipment of said hay the defendant delivered to the plaintiff a bill of lading, in substance as follows:—

MARLBORO, IND., *Dec.* 10", 1892.

Received from Patrick Maguire—the property described below, in apparent good order. Marked consigned and destined as indicated below which said Louisville, New Albany & Chicago
360–364 Railway Company agrees to carry to said destination; description of articles—nine tons of hay. Consignees and destination G. S. Blakeslee & Co. Chicago, Ills.—And then and there entered into a contract with the plaintiff to ship said hay to Chicago and within a reasonable time, and in good order.

22nd. That by reason of said hay being damaged as herein found the same became worthless and wholly without value, and the plaintiff received nothing therefor, and was lost to him.

Third paragraph.

I further find that the defendant entered into a contract in the fall of 1892, with the plaintiff, whereby it agreed to ship said 872.81 tons of hay on the following terms and conditions, to-wit:—To Chicago at the rate of six cents per hundred pounds; to Cincinnati at the rate of ten cents per hundred pounds; to Pittsburg at the rate of fifteen cents per hundred pounds; to New York and points in the State of New York at the rate of twenty-five cents per hundred pounds; to Peoria Illinois at the rate of seven cents per hundred pounds.

23rd. I further find that the defendant furnished plaintiff with cars 76 cars of inferior size, which would not hold ten tons of hay on the contrary they would average only nine tons of hay, that the plaintiff made objections to the defendant of the size of these cars, that he was informed by the agent of the defendant at Marlboro that they were the best cars he could get, that the defendant demanded and exacted of the consignee- of the plaintiff, freight charges at the rate of ten tons per car which the consignees were compelled to and did pay freight at the rate of ten tons per car, which consignees charged up to the plaintiff and which the plaintiff was compelled to pay and did pay thus and thereby the plaintiff was compelled to pay excessive freight as follows: On one car to Chicago
365 $1.20, 29 cars shipped to Cincinnati, on which the plaintiff was thus compelled to pay and did pay for 29 tons extra at the rate of fifteen cents per ton amounting to $58.00, that he shipped 15 cars to Pittsburg, for which the defendant demanded and received pay as aforesaid at the rate of ten tons per car and the plaintiff was compelled as herein found to pay extra freight to the amount of 15 tons at the rate of $3.00 per ton, in all $45.00, of the seventy six cars thirteen were shipped to New York for which the defendant demanded and received and which the plaintiff was compelled to pay as herein found freight at the rate of ten tons per car, thus and thereby the plaintiff was compelled to pay, which was received by the defendant the thirteen tons of extra freight at the rate of $5.00 per ton which would be $65.00. Of the seventy six cars sixteen were shipped to Peoria, Illinois, for which the defendant demanded and received and this plaintiff was compelled to pay as herein found at the rate of ten tons per car, that the defendant thus received and the plaintiff compelled excessive freight to the amount of sixteen tons at the rate of $1.40 *cents* per ton amounting in all $22.40. That the defendant exacted of the plaintiff's consignee above the contract price and received the same for freight, which the plaintiff was compelled to pay as herein found to the amount of $181.60.

24th. I further find that said payment of excessive freight by the plaintiff was not voluntary, and was paid as herein found.

25th. I further find that the defendant was not entitled to receive and demand such excessive freight.

Conclusions of Law upon the Foregoing Facts.

1st. I find the law to be as follows:—The plaintiff is entitled to recover upon the first paragraph of his complaint the
366 sum of $1702. *dollars* with interest thereon from the first day of June 1893. amounting to $306.36 *dollars*, in all the sum of $2008.36 and judgment should — for the plaintiff for that amount.

2nd. I find that the plaintiff is entitled to recover from the defendant upon his second paragraph of complaint the amount of seventy-six dollars and fifty cents with interest thereon from the first day of January, 1893. amounting to $13.68 *dollars*, in all $90.18 and judgment should be for plaintiff for — amount.

3rd. I find that the plaintiff is entitled to recover from the defendant upon the third paragraph of his complaint the sum of one hundred and ninety-one dollars, with interest thereon from the first day of June 1892. amounting to $36.38 *dollars* in all $227.98 *dollars* and judgment should be for plaintiff for that amount.

GEORGE BURSON,
Special Judge."

The defendant by counsel now except- to each conclusion of law herein.

Upon his foregoing finding of facts and conclusions of law thereon, the court finds for the plaintiff; that there is due the plaintiff and from the defendant the sum of two thousand four hundred and sixteen dollars and thirty three cents.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant the said sum of two thousand four hundred and sixteen dollars and thirty three cents, with interest at the rate of six per cent. per annum, together with his costs made, paid out and expended.

The defendant by counsel now filed its motion in these words towit:—(insert) for a new trial of this cause.

The court now overrules the motion of the defendant for a new trial hereof; to which ruling of the court the defendant excepts
367 and the defendant is given 90 days in which to file bond in the sum of three thousand dollars; and to file its bill of exceptions herein.

STATE OF INDIANA, }
White County, } ss:

I, F. B. Humston clerk of the circuit court in and for said county and State certify the above and foregoing to be a full true and complete copy of the judgment rendered in this court in the above entitled cause.

Witness my hand and the seal of said court at office this 23rd day of January 1897.

F. B. HUMSTON,
Clerk Circuit Court.

[SEAL.]

(Endorsed on back :) Filed and recorded January 28″ 1897 at 1 o'clock p. m. of said day Jno. C. Jones clerk Pulaski circuit court.

368 *Execution Docket.*

Defendants offered in evidence execution docket # 17 of the White circuit court, (it being admitted by the parties to this suit that it is execution docket # 17 of the White circuit court) at pages 225, 225, 230, 230, 231, and the said pages of the said docket being then read and given in evidence were in the words and figures following, towit:—

Date of issuing.	Kind of writ.	Parties.	
		Plaintiff.	Defendant.
1897. Oct. 16″	1″ Ex.....	Patrick Maguire..	L. N. A. and C. Ry. Co.

Against whom judgment was rendered.	Amount of judgment.	Date of judgment.	Costs.	To what officer issued.
	$ Cts.		$ Cts.	
Def't.....	2,416.33	1896. Sept. 24″....	68.52	Sheriff Pulaski.

To whom delivered.	Officer's return to the writ.
Co. by C. C. Spencer, att'y....	

WINAMAC, INDIANA, *Oct. 18th*, 1897.

This writ of execution came to hand, October 18th, 1897, and after a strict and careful search I found no personal property of the defendant within my bailiwick of any kind or nature on which to levy said execution and I then levied upon the following real estate as the property of the said defendant, in Pulaski county, Indiana, described as follows, to-wit:—Commencing at the northwest corner

of lot 12 in block 9 in the town of Francesville, in Pulaski county, Indiana, thence west with the south line of Yellow street to the west line of Bill street to the place of beginning, thence west with the south line of Yellow street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago rail road, thence south with the east line of said right of way 190 feet, thence east, parallel with the south line of said Yellow street to the west line of Bill street thence north with the
369 west line of Bill street to Yellow street to the place of beginning.

Also commencing at the south west corner of lot 7 in block 9 in said town, thence west to the west line of Bill street to the place of beginning, thence west with the north line of Montgomery street to a point 5 feet east of the east line of the right of way of said railroad, thence north parallel with said right of way 66 feet to post; thence east parallel with the north line of Montgomery street to the west line of Bill street thence south with the west line of Bill street to Montgomery street to the place of beginning.

Also commencing at the north west corner of lot 12 in block 14, thence west with the south line of Montgomery street to the west line of Bill street to the place of beginning, thence west with the south line of Montgomery street to a point 30 feet east of the east line of the right of way of said railway company, thence south, parallel with the east line of said right of way to James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street to the south line of Montgomery street to the place of beginning.

Also commencing at a point at the north west corner of lot 12 in block No. 22, thence west with the south line of James street to the west line of Bill street at the place of beginning, thence west with the south line of James street to the east line of the right of way of said railway, thence south with the east line of said right of way, to the north line of Lyman avenue, thence east with the north line of Lyman avenue, to the west line of Bill street, thence north with the west line of Bill street to the south line of James street to the place of beginning, all of said land being in the town of Francesville, in Salem township, in Pulaski county, in the State of Indiana,
370 and immediately after making my said levy on said real estate I caused the same to be appraised by E. H. Applegate and J. A. Engle, both of whom are resident householders and free holders of said town of Francesville, of the township of Salem, county of Pulaski and State of Indiana, the town, township, county and State within which said real estate is situated, which said appraisement of said real estate was appraised in parcels, reduced to writing and is filed herewith as part of this, my return of said execution.

And on the 22nd day of October, 1897, in pursuance to the command of this execution, I advertised the real estate herein described for sale at the court house door of Pulaski county, Indiana, on the 13th day of November, 1897, by publication in the Pulaski County

Democrat, a weekly newspaper of general circulation printed and published in the town of Winamac, in said town and county and nearest to where said real estate is situated, for more than three weeks successively, immediately before the day of sale and by posting up a printed notice thereof at the court house door of said county and by posting up like printed notices thereof at three public places in the town of Francesville, in the township of Salem in said county, the township in which said real estate is situated, which was done more than twenty days immediately preceding the day of sale, a copy of said notice being hereunto attached and made a part of this return.

And on the day set for the sale of said real estate, to-wit:—November 13", 1897, between the hours of 10 o'clock a. m. and 4 o'clock p. m. at the court house door of said county, I first offered to the highest and best bidder, for cash in hand the rents and profits of all that portion of said real estate of the following description, to-wit:—

371 Commencing at the north west corner of lot 12 in block 9 in the town of Francesville, in Pulaski county, Indiana, thence west parallel with Yellow street in said town, 50 feet to a post on the west line of Bill street at the place of beginning, thence west parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way 190 ft. to a post, thence east parallel with the south line of Yellow street 150 feet to the west line of Bill street thence north with the west side of Bill street, 190 feet to the place of beginning (which said described land I will hereinafter refer to in this return and designate it as "tract No. 1") for a period not exceeding seven years, by the year, and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash in hand, the rents and profits of all that portion of said real estate, of the following description, to-wit:—all that portion thereof, commencing at the south west corner of lot 7 in block 9 in said town, thence west with the north line of Montgomery street, to the west line of Bill street at the place of beginning, thence west with the north line of said Montgomery street to a post at a point 5 feet east of the east line of the right of way of said railway company, thence north, parallel with the east line of said right of way 66 feet, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with the west line of Bill street to the place of beginning (which tract last above described I shall hereinafter refer to in this return and designate it as tract No. 2) for a period not exceeding seven years, by the year, and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash in hand, the rents and profits of all that portion of said real estate of the following description, to-wit:—

372 Commencing at the north west corner of lot 12 in block 14 in said town thence west with the south line of Montgomery

street to the west line of Bill street to a post at the place of beginning, thence west with the south line of Montgomery street to a point 30 feet east of the east line of the right of way of said railway company, thence south parallel with the east line of said right of way 360 feet to the north line of James street thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street to the place of beginning, (which tract last above described I shall, in this return, hereinafter refer to and designate as "tract No. 3," for a period not exceeding seven years by the year, and receiving no bid therefor I did then and there offer to the highest and best bidder, for cash, the rents and profits of all that portion of said real estate of the following description, to-wit:—

Commencing at the north west corner of lot 12 in block 22 in said town, thence west with the south line of Lyman street to the west line of Bill street to the place of beginning, thence west with the south line of James street to the east line of the right of way of said railway company, thence south wi- the east line of said right of way to the north line of Lyman avenue, thence east with the north line of Lyman avenue, to the west line of Bill street, thence north with the west line of Bill street to the south line of James street to the place of beginning, which tract of land last above described, I shall, in this return hereinafter refer to and designate as "tract No. 4," and receiving no bids therefor I did then and there offer the rents and profits of tracts Nos. one and two for a period not exceeding seven years by the year, for cash in hand, to the highest and
373 best bidder, and receiving no bid therefor, I then and there offered to the highest bidder for cash in hand the rents and profits of tracts Nos. 1–2 & 3 for a period not exceeding seven years, by the year and receiving no bid therefor I then and there offered to the highest and best bidder for cash in hand, the rents and profits of tracts Nos. 1–2–3 & 4 for a period not exceeding seven years, and receiving no bids therefor I then and there offered to the highest and best bidder for cash in hand the fee simple right of the defendant of, in and to said tract No. 1 of said real estate and receiving no bid therefor I did then and there offer to the highest and best bidder for cash the fee simple right of the defendant of, in and to tracts Nos. 1 and 2 of said real estate and receiving no bid therefor I did then and there offer the fee simple right of the defendant of in and to tracts Nos. 1–2 & 3 of said real estate and receiving no bid therefor I did then and there offer to the highest and best bidder for cash in hand the fee simple right of the defendant company in and to any two of said tracts and receiving no bid therefor, I did then and there offer to the highest and best bidder for cash in hand the fee simple right of the defendant company of, in and to any three of said tracts and receiving no bid therefor I did then and there offer the fee simple right of the defendant company in and to tracts Nos. 1–2–3 & 4, being all of said described real estate and Medary M. Hathaway bid therefor the sum of

two thousand dollars, ($2,000.00) and that being the highest and best bid then and there offered and the same being more than two-thirds of the appraised value thereof the same was openly struck off and sold to said Medary M. Hathaway for the sum of two thousand dollars ($2,000.00), there being present at and during all the time
374 of said sale more than three competent bidders; and the said purchaser having paid over to me the amount so bid by him, I did then and there execute to him my certificate of purchase, bearing even date herewith.

I then paid over to the plaintiff, as per. his receipt herewith and hereon eighteen hundred fifty one and 33/100 dollars. I paid over to the clerk of White county sixty nine and 87/100 dollars original costs and have retained fifty two and 80/100 dollars. my fees. Paid over to J. J. Gorrel, printer twenty two dollars, his fees, as per, his receipt hereon. Paid to E. H. Applegate two dollars his fee as appraiser as per. his receipt hereon and paid to J. A. Engle his fees as appraiser ($2.00) as per his receipt hereon, and I hereby return this writ of execution unsatisfied as to the balance due thereon, having found no other property of the defendant company subject to execution within my bailiwick.

PHILLIP DELLINGER,
Sheriff Pulaski County.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger, sheriff two dollars, my fees in full as appraiser in the above cause.

J. A. ENGLE.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger sheriff, two dollars, my fees in full for services as appraiser in above cause.

E. H. APPLEGATE.

WINAMAC, INDIANA, *Nov.* 13*th*, 1897.

Received of Philip Dellinger, sheriff twenty two dollars my fees in full for publishing notice of sheriff's sale in McGuire *vs.* L. N. A. & C. Ry. Co.

J. J. GORRELL.

375 WINAMAC, IND., *Nov.* 13, 1897.

Received of Philip Dellinger, sheriff Pulaski county, eighteen hundred fifty one and 35/100 dollars to apply on above judgment.

PATRICK McGUIRE,
By WINFIELD, SPENCER & STEIS &
HATHAWAY, *Plf's Att'ys.*

White County Circuit Court, September Term, 1896.

PATRICK MCGUIRE
against
LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

The following is a list of property levied upon by virtue of an execution in this case, by me Philip Dellinger, sheriff of Pulaski county, Ind. on this 18th. day of October, 1897, to-wit:—

	Appraisement. Dollars. Cents.
Commencing at the north west corner of lot No. 12 in block 9 in the town of Francesville in Pulaski county, thence west parallel with the south line of Yellow street in said town, fifty feet to a post on the west line of Bill street in said town, said post being at the place of beginning, thence west parallel with the south line of Yellow street in said town to a post at the last line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company thence south parallel with said east line of said right of way—190—feet to a post, thence east parallel with the south line of said Yellow street to the west line of said Bill street, thence north parallel with the west line of said Bill street 190 feet to the place of beginning.—	$600.00.
376 Also—	
Commencing at the south west corner of lot seven—(7)—in block nine (9) in said town thence west with the north line of Montgomery street in said town to the west line of Bill street to a post at the place of beginning, thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the last line of said right of way sixty-six (66) feet to post, thence east parallel with the north line of said Montgomery street to the west line of Bill street thence south with the west line of Bill street sixty six (66) feet, to the place of beginning.—	$600.00.

Also—

Commencing at the north west corner of lot twelve (12) in block fourteen (14) in said town of Francesville, thence west with the south line of Montgomery street to a post on the west line of Bill street at the place of beginning, thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of the right of way of what was formerly known as the Louisville, Chicago and New Albany Railway Company, thence south parallel with the east line of said right of way three hundred sixty feet, (360) to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north parallel with the west line of Bill street three hundred sixty (360) — to the place of beginning, at south line of Montgomery street.—	$1200.00.

377 Also—

Commencing at the north west corner of lot No. twelve—(12) in block twenty-two (22) in said town of Francesville, thence west with the south line of James street to a post at the west line of Bill street at the place of beginning, thence west, with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred sixty feet (360) to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street three hundred sixty feet (360′) to the south line of James street, at the place of beginning.	$600.00.

All the above described tracts of lands being in the town of Francesville in Pulaski county, in the State of Indiana.

We, the undersigned, selected to appraise the property mentioned in the schedule, to which this is annexed, upon oath say that the several items, to the best of our judgment are worth the respective sums specified therein and that the same is a fair cash value at this time (exclusive of liens and incumbrances).

JOSEPH A. ENGLE,
E. H. APPLEGATE,
Appraisers.

Subscribed and sworn to before me, this 20th. day of October, 1897.

PHILIP DELLINGER,
Sheriff Pulaski Co.

Filed December 1"—1897.

F. B. HUMSTON, *Clerk.*

378 *Sheriff's Sale.*

By virtue of an execution to me directed from the clerk of the White circuit court, I will expose at public sale to the highest bidder, on Saturday, November 13, 1897, between the hours of ten o'clock a. m. and four o'clock p. m. of said day, at the door of the court house in Pulaski county, Indiana, the rents and profits, for a term not exceeding seven years, of the following described real estate, to-wit:

Commencing at the northwest corner of lot number twelve (12) in block No. nine (9) in the town of Francesville, in Pulaski county, in the State of Indiana, thence west parallel with the south line of Yellow street in said town fifty feet (50) to a post on the west line of Bill street at the place of beginning; thence west parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way one hundred and ninety (190) feet to a post, thence east parallel with the south line of said Yellow street to the west line of Bill street, thence north with the west line of said Bill street one hundred and ninety (190) feet to the south line of Yellow street at the place of beginning. Appraised at $600.00.

Also commencing at the south west corner of lot No. (7) seven in block No. nine (9) in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel
379 with the east line of said right of way sixty-six (66) feet to a post, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with the west line of Bill street sixty-six (66) feet, to the place of beginning. Appraised at $600.00.

Also—commencing at the north-west corner of lot No. twelve (12) in block No. fourteen (14) in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel

with the east line of said right of way three hundred and sixty (360) feet to the north line of James street, thence east with the north line of James street to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of Montgomery street to the place of beginning, appraised at $1,200.00.

Also—commencing at the northwest corner of lot No. twelve (12) in block No. twenty-two (22) in said town, thence west with the south line of James street to the west line of Bill street to a post at the place of beginning; thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of James
380 street to the place of beginning, appraised at $600.00.

All the above described tracts of land being in the town of Francesville, in Pulaski county, in the State of Indiana.

And in the case the rents and profits fail to bring the amount demanded to satisfy the decree aforesaid, interest and costs, together with accruing costs, I will at the same time and place and in like manner as aforesaid, offer for sale at public auction and outcry, to the highest bidder, all the right, title, interest and estate in fee simple of the Louisville, New Albany and Chicago Railway Company in and to the above described real estate, or so much and such part thereof as may be necessary to satisfy the decree aforesaid, which is in favor of Patrick McGuire and against the Louisville, New Albany and Chicago Railway Company.

Said sale will be made subject to relief from the valuation and appraisement laws of the State of Indiana at not less than two-thirds (⅔) the appraised value thereof.

PHILIP DELLINGER,
Sheriff Pulaski County, Ind.

Oct. 22, '97.

STEIS & HATHAWAY, *Attorneys.*

381 MEDARY HATHAWAY.

MEDARY HATHAWAY, a witness called on behalf of the defendants, after being first duly sworn, testified as follows, to-wit:

Examination in chief.

Questions by Judge WINFIELD, of counsel for the defendants:

Q. State your name to the court and jury?
A. Medary Hathaway.

Q. You are one of the defendants in this case?
A. I am.
Q. You live in Winamac, Indiana?
A. Yes, sir.
Q. I will ask you if you were with the sheriff at the time the levy was made on the property described in this return?
A. I was.
Q. How long had you been acquainted with that ground?
A. I presume for eighteen or twenty years.
Q. I will ask you if any part of that ground has ever been used by the railroad, the Louisville, New Albany and Chicago Railway Company or the Louisville, New Albany and Chicago Railroad Company?

Plaintiff objected to the question, because the title derived under the deed of Brooks is complete, irrespective of whether the property was used by the railroad company or not; it is not competent for the defendants in this case to either present the issue or have any rights determined upon the issue of the land taken under the deed of conveyance to be necessary or unnecessary; that the question of whether the title and extent of the property taken was necessary or unnecessary, is only a question which the statute itself can raise, and that the defendants have no right under the laws to interpose the issue as to whether the land was used or whether it was in fact necessary for railroad purposes; plaintiff objected further for the following reasons; first: It is not within the province of the jury to determine whether the property in question is necessary or not necessary for the use of the railroad company; second: That it is not within the province of the jury to determine whether under the franchises of the company the property is necessary, suitable or proper for the use of the railroad company. Third: That the evidence is wholly irrelevant and immaterial; plaintiff objected further to the question, because it does not confine the inquiry to the date that the railway company acquired its title under the deed of Brooks but leaves it unlimited so as to inquire as to the use of the property in controversy before the plaintiff obtained its deed.

State

382

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. You have reference to the property levied upon,—no sir.
Q. State the character of the use it has been put to since you knew it?

Plaintiff objected to the question for the reasons: First: It is not within the province of the jury to determine whether the property in question is necessary or not necessary for the use of the railroad company. Second: It is not within the province of the jury to determine whether under the franchises of the company the property is necessary, suitable or proper for the use of the railroad company. Third: That the evidence is wholly irrelevant and immaterial;

fourth: Because it does not confine the inquiry to the date that the railway company acquired its title under the deed of Brooks but leaves it unlimited so as to inquire as to the use of the prop-
383 erty in controversy before the plaintiff obtained its deed. And for the added reasons that defendants can not as to this plaintiff who took title to this property March 31st, 1897, go back of that date as to this plaintiff nor as to the Louisville, New Albany and Chicago Railway Company, go back of the Brooks' deed.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. It is used by parties for storing corn and grain, by business men, general merchandise business, such as restaurants, groceries, and mercantile business, by men with offices for lumber yards; it has a building containing the post office, and has had for a number of years,—one or two elevators and used for general purposes, you might say, by the citizens,—blacksmith shop on it and lumber yard, and corn crib.

Q. Any barber shop on it?

A. Yes sir, a barber shop.

Q. What is the character of the buildings there, frame or brick?

A. They are frame,—one elevator is a frame building with a metallic outside of some kind.

Q. How is this ground situated with reference to the town of Francesville, as to being near the center?

A. It is, you might say, in the center of the town.

Q. Which is the principal business street?

A. Bill street, I would judge.

Q. Have you a plat of this ground?

A. No sir, I haven't an accurate plat; I had at the last trial and the reporter, Miss Decker, informed me it was here, but I don't find it among the papers; I have it in my mind, however, but no accurate plat.

384 Q. Where is this located with reference to the right of way of the railroad company, plaintiff?

A. It is immediately east of the right of way, west of Bill street, in the town of Francesville, and between Yellow street on the north running east and west, and Montgomery street, the first street south running east and west, and between Montgomery running east and west, and James street the second lot, and the third lot is between James street and Lyman avenue.

By Mr. KRETZINGER:

Q. Does your levy cover the whole of this one hundred and fifty feet described in the Brooks deed?

A. It does not.

By Judge WINFIELD:

Q. What part is not embraced?

A. The stock pens; no part that is used or ever been used by the railroad company was levied upon.

Q. Where is the depot with reference to this?

Plaintiff objected to the question, for the reasons first: It is not within the province of the jury to determine whether the property in question is necessary or not necessary for the use of the railroad company. Second: It is not within the province of the jury to determine whether under the franchises of the company the property is necessary, suitable or proper for the use of the railroad company. Third: Because it does not confine the inquiry to the date that the railway company acquired its title under the deed of Brooks, but leaves it unlimited so as to inquire as to the use of the property in controversy before the plaintiff obtained its deed.

The court overruled the objection, to which ruling of court, the plaintiff, at the time, excepted.

A. The depot is on the right of way, on the east fifty feet of
385 the right of way, in the center lot.

Q. Is the right of way fenced to indicate the width of it, any part near there so as to indicate the width of their right of way?

Plaintiff objected to the question, because it calls for a conclusion.

Q. Where is it fenced?

A. On the north lot there is a fence on the east line of the right of way and around particularly the north one hundred and ninety feet that was levied upon and was being used by Prewett and McMurray for storing corn and hay; it has a hay barn and three corn cribs on it.

Q. That fence you speak of enclosing the right of way, how wide is it there?

Plaintiff objected to the question, because the answer would be merely a conclusion.

Q. Assuming there is a right of way, suppose there is a right of way there, how wide is it from that fence across?

A. Fifty feet from the center of the track to each side, on the east side; the land levied on is all on the east side of the track; fifty feet from the center of the main track.

Q. What is the size of the town of Francesville, the population?

A. I would judge it as a town of six hundred to eight hundred people.

Q. What is the fact about this company leasing those grounds and for what purpose?

By Judge FIELD: You mean the present company, the plaintiff in this case?

By Judge WINFIELD: Yes, sir.

(By the WITNESS:)

A. I was over there a few days ago and had a talk with the parties.

Q. What do you know as a fact?

386 Plaintiff objected.

By Judge FIELD: Do you know in any other way than by conversation with people?

A. Yes sir, I saw the leases.

Plaintiff objected to the question, because the leases are the best evidence.

By Judge WINFIELD: Did you talk with the parties there in possession; who did you find in possession of the property—name the parties?

A. Prewett and McMurray are in possession of the north one hundred and ninety feet, north of the stock pens, and then the stock pens, which were not levied upon, is a little south of the center of that north lot, and immediately south of the stock pens is being used and occupied—this is fronting on Montgomery street, on the west end of the south end of that particular tract, or the sixty-six feet levied upon is used by Mr. Haymond for a grain elevator, and his scale there, a weighing scale, just east of the elevator; and the the next piece fronting on Montgomery street and the south end of the north lot contains a sort of store house for salt and such as that, used by Mr. Brewer, and adjoining it is the Brewer general store, groceries, merchandise of all kinds, and on the corner and immediately east of the Brewer store and adjoining the Brewer store is a building occupied by Wood Thrasher as an ice cream parlor, barber shop and restaurant; that takes up the entire space of the north lot; the part that was levied upon is the part that is being occupied by Prewett and McMurray for their grain and hay business and by Mr. Haymond for his warehouse, and Mr. Thrasher and Mr. Brewer in their store business.

Plaintiff objected to all this evidence, for the reasons, first:
387 It is not within the province of the jury to determine whether the property in question is necessary or not necessary for the use of the railway company. Second: It is not within the province of the jury to determine whether under the franchises of the company, the property is necessary, suitable or proper for the use of the railroad company. Third: Because it does not confine the inquiry to the date that the railroad company acquired its title under the deed of Brooks, but leaves it unlimited so as to inquire as to the use of the property in controversy before the plaintiff obtained its deed.

The court overruled the objection, to which ruling of the court, the plaintiff at the time, excepted.

Q. I will ask you if you talked with those parties in possession—Prewett and McMurray?

A. Yes, sir.

Q. What did they say as to how they held it—the character of their possession?

Plaintiff objected to the question, because it is hearsay evidence that is called for, any statement of theirs; declarations made by a party, not to the suit, respecting the character and use of the property are incompetent.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. Yes sir, they were holding it through a lease from the Chicago, Indianapolis and Louisville Railway Company, or the plaintiff.

Plaintiff moved the court to strike out the answer, because it is a statement of a party as to the character of his possession, which appears to be under a written lease.

388 The court overruled the motion, to which ruling of the court, the plaintiff, at the time, excepted.

By Judge FIELD: Did he say he had a written lease?

A. Mr. Prewett did, and he showed me his lease.

Plaintiff moved the court again to strike out the answer of the witness, to wit: "They said they were holding it through a lease from the Chicago, Indianapolis and Louisville Railway Company, or the plaintiff," for the reason that it appears from the evidence that the character of the holding was under a written document.

The court overruled the motion, to which ruling of the court, the plaintiff, at the time, excepted.

By Judge WINFIELD:

Q. You may look at this map (handing witness a map to examine).

(It is admitted by the parties that this is a correct map and that the red lines on the map indicate the ground levied upon.)

Q. Upon the assumption that the railroad right of way is one hundred feet wide,——

A. I judge that is a correct map.

Q. Which is the north lot?

A. This is Yellow street running along the north side of the three lots that have been mentioned, and this enclosed by the red line at the extreme north end of these lots is a portion of the property levied upon; (indicating on map). On this ground is the hay barn that is now in the possession of Prewett and McMurray, at that point there, (indicating on map); then along in there are three corn cribs filled with corn, that are also used by Prewett and McMurray (indicating on map); then this open space here is the stocks pens;

that was not included in the levy; I might say at this point indicated on the map, is a hog pen and a pair of weighing scales
389 for hay and large loads; that is in the possession of John Coster; then comes the stock pens in that open space there; (indicating) that was not levied upon, from the railroad to the street.

Q. How long have those stock pens been there to your knowledge?

Plaintiff objected to the question, for the reason-, first: It is not within the province of the jury to determine whether the property in question is necessary or not necessary for the use of the railroad company. Second. It is not within the province of the jury to determine whether under the franchises of the company, the property is necessary, suitable or proper for the use of the railway company. Third: Because it does not confine the inquiry to the date that the railway company acquired its title under the deed of Brooks, but leaves it unlimited so as to inquire as to the use of the property in controversy before the plaintiff obtained its deed.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. They have been there ever since I have known the town.

Q. About twenty years?

A. Yes sir, all of twenty, and more than twenty, I guess.

Q. Go on and describe the rest of it?

A. Here is the fence that I spoke of (indicating on plat) fifty feet, east of the center of the track, inclosing that part that Prewett and McMurray occupies.

Q. How near to the red line on the west there is the fence?

A. It would be on the red line.

Q. Inside of that fence, what is there there?

A. It is the railroad main track and the railroad side track.

Q. That fence you say is fifty feet from the center of the
390 track?

A. Fifty feet east from the center.

Q. Of the main track?

A. Yes sir, the enclosure in the red lines, south of the stock pens and north of Montgomery street and immediately adjoining Montgomery street is the second enclosure that I described in my testimony; it is being used by the several parties suggested; at the extreme west it is used by W. C. Haymond for his grain elevator, and in this little space there, (indicating on the plat) are his scales, or they were there up to a short time ago; I am not certain they are there now, but they were there when the levy was made, at least; and this is the salt bin that I spoke of—a little storehouse for salt and those things connected with a grocery store, not ordinarily kept in the store; it is being used by Mr. Brewer; then comes the Brewer store—this is the Brewer store, (indicating on plat), and there is a short space between the two buildings fronting on Montgomery street that extends clear out to Bill street and comes around

this little building which is occupied by Wood Thrasher, and they abut up against each other; I don't think they are eight inches apart; up here they meet (indicating), the two buildings, and that is the Wood Thrasher building in which he has a barber shop and ice cream parlor and a restaurant.

Q. You speak of Montgomery street south of the north lot; state whether that is an improved street?

A. Yes sir.

Q. How long has that street been there?

A. Ever since I have known the town—more than twenty years.

Q. Is it generally travelled?

A. It has been.

391 Q. How are these buildings situated with reference to fronting on that street?

A. They front on Montgomery street.

Q. Take it across the railroad, what is on the corner of lot sixty, as contained on this map?

A. It is on lot one in block fifteen,—the hotel building.

Q. Which way does that face?

A. It faces this street, or the railroad; it faces east.

Q. Now pass to the middle lot there, the one south of Montgomery street and describe what is on that?

A. That is the enclosure in the red line, indicating the part levied upon; that extends from Bill street west one hundred twenty feet to that point (indicating on map) and upon this enclosure that was levied upon, we first have an office, a grain office that is used by Prewett and McMurray.

Q. What is there immediately west of that?

A. Immediately west of it, there was at the time we made the levy, a little band stand, but that has been torn down since; there is sheds and lumber up to a little road between this point (indicating on map) and the part levied upon.

Q. Which way does that office front?

A. It fronts on Bill street, fronts east: all of those buildings are fronting east, (indicating on plat).

Q. What is the next building to Prewett's office?

A. The next building is the post office.

Q. That is not indicated on this map?

A. No sir, it is not; the post office faces east; all the building on this particular tract here (indicating on plat) face east on Bill street; and next to the post office I believe is an office used by Mr. Shellenbarger, a lumber office—his private office—and next to his office is the lumber shed, Mr. Shellenbarger's lumber shed, occupied and used by him for storing his better grade of lumber.

392 Q. How far does his lumber shed and the lumber extend back?

A. It extends back to the west line of the part levied upon.

Q. How long has it been there, if you know?

A. Mr. Shallenbarger hasn't been there very long; I have known

him two or three years, I judge, at least, and probably five years; I wouldn't say certain, but he has been there at least three years.

—. Did you talk with him?

A. Yes sir.

Q. How did he say he was holding there?

Plaintiff objected to the question.

Q. What did he say with reference to his possession—how he was holding possession?

Plaintiff objected to the question, on the ground that it is calling for hearsay evidence, and not binding upon the plaintiff in this cause.

The court sustained the objection, to which ruling of the court, the defendants at the time, excepted.

Q. Did you find him there on the ground when you were there last?

A. Yes sir.

Q. What did he say there as to how he was there or why he was there?

Plaintiff objected to the question on the ground that it is calling for merely hearsay evidence,

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. He said that he had leased it from the plaintiff in this case the railroad company.

Q. Next south from Mr. Shellenbarger's office, what is there?

A. I believe that is the blacksmith shop, the Nelson blacksmith shop, a rude shed used by him in the blacksmith busi-
393 ness.

Q. How long has that been there?

A. I judge that it has been there three to five years—maybe longer—all of five I would say.

Q. Does he carry on the business of blacksmithing?

A. Yes sir.

By Judge WINFIELD: I will have to modify the admission that this is an accurate map of the location; I see it is not an accurate map as to the location of buildings.

Q. What is there on the lot next south of that?

A. The balance of that part that we are describing here of the middle lot that was levied upon is occupied by Joseph Myers & Son; next and a short distance from the Nelson blacksmith shop, fronting on Bill street, they have a private office; then immediately south of their office is a couple of corn cribs, quite lengthy corn cribs filled with corn; and then immediately back of the corn cribs is an elevator in the southwest corner of this tract that was levied upon—a grain elevator.

Q. Used by them in their business?
A. Yes sir, used by them in their business.
Q. Did you see them there when you were there?
A. Yes sir, I saw them.
Q. Did you find them there in possession?
A. Yes sir.
Q. What did he say as to his possession when you found him there?

Plaintiff objected to the question on the ground that it is calling for hearsay evidence.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. He said he was there under a lease from the plaintiff,
394 the railway company.
Q. Go on now.
A. I might suggest in addition to that and scattered over the south end, the space that is not covered particularly by buildings, you find a little of everything; there is some old threshing machines, and engines and things of that kind—not railroad engines, but threshing machine engines—complete outfits there.
Q. I will ask you if all of that middle lot at the time of the levy and up to the present time, is embraced in that,—the land levied on was occupied and used for private purposes.

Plaintiff objected to the question, because it embodies simply a conclusion, and as to private purposes, that depends on the character of use.

The court sustained the objection, to which ruling of the court, the defendants, at the time, excepted.

Q. What, if any part, of that middle lot has been used by the railroad, within your recollection, for railroad purposes?

Plaintiff objected to the question, on the ground that whether it is used or not is wholly immaterial; that the title of the plaintiff is in no sense dependent upon the question as to whether the property was actually used or not, and because if it is used by the public, in reaching the depot or any of the buildings on the track or side track or merchandise track of the common carrier, that constitutes use.

The court overruled the objection, to which ruling of the court, the plaintiff, at the time, excepted.

A. It has not; it has been used just as I have described it here;
there is a drive-way between this and the side track to the
395 depot (indicating on the plat), that is used there for loading
and unloading and hauling lumber, but that drive-way is west and outside of the ground that was levied upon; the balance has been used just as I have described it.

Q. Describe how, since your recollection, the depot has been reached by the public—what route has been used?

A. The depot would be reached from either end; it is open from this street south to the depot (indicating on the plat); that is an open space there on the right of way, and getting to and from the depot with loads and unloading is by that alley that I described between this ground and the depot grounds or the side track (indicating on plat).

Q. Is there a well defined track there leading up to the depot, outside of the grounds levied upon?

A. There is; there is no way leading to the depot over the grounds that was levied upon that is used by anybody for the purpose of getting to the depot or the railroad, or any business connected with the railroad company.

Q. I see marked on the map, James street; describe that and state whether or not that is an improved street?

A. James street is a street that is travelled, but it is not improved; it is a street that has been used and travelled but there is no particular improvement on it. When I spoke of Montgomery street being improved, that has been improved by ordinance as I understand it; it is a gravel road.

Q. James street has not been gravelled?

A. No sir.

Q. But is used and travelled by the public?

A. Yes sir.

Q. State what is west of that grain elevator down there?

A. That is the right of way of the railroad company—the depot, the side track, and the alley-way immediately east of the side track.

396 Q. Is there any part of the lay-out of the road upon this middle lot levied upon?

Plaintiff objected to the question on the ground that it is a mere conclusion; it is not for the witness to say what the lay-out of the road is.

The court sustained the objection, to which ruling of the court, the defendants, at the time, excepted.

Q. Was there any part of the railroad track, depot or any other within that red line on the middle lot?

A. No sir.

Q. Passing to the south of James street, what is there on that south lot?

A. The plat in that respect is deficient also; it properly lines the grain elevator upon it but does not show the buildings.

Q. State what buildings are on it?

A. Pretty well to the north-west corner of this tract is an office that is occupied by Whittaker—I believe his name is Whittaker; a little south and east of that—south of it, it is, and extending a little east of that is the Whittaker bins or cribs for storing of corn, and

they have a corn sheller and an outfit of that kind; and over at about that point in the northeast corner (indicating on the plat) probably forty or fifty feet south of the north line of this, and pretty well up to the east line is a large corn crib that is owned and occupied and used by this man Whittaker; then at the time we levied upon it, it was dotted over pretty much by tile; I don't know who had the tile there; it was tile scattered promiscuously over the lot levied upon; and there is now a stone crusher outfit standing there; I don't known who that belongs to.

Q. Is there anything else on the south lot levied on?

397 A. Not that I recall.

Q. What is there south of the south lot?

A. Lyman avenue, that is the street south.

Q. Is that a street travelled by the public?

A. It is and has been ever since I have known the town.

Q. Has it been improved any?

A. It has not; they are hauling some dirt from the street but it has not been improved.

Q. What buildings besides this depot and the cattle-pens have the railroad company on the right of way there?

A. They have, I presume you would call it, a tool or car-house; it is an old box car.

Q. Is that on the right of way?

A. Yes sir, that is on the right of way.

Q. None of it on this ground?

A. None of it.

Q. Do you know the line of the road of the plaintiff, where it starts from, coming from the north?

A. From Michigan City.

Q. Where does it run to—where does it run south?

A. From Michigan City to Monon, on south to Indianapolis and to New Albany.

Q. At Monon, what do you know about its crossing the Indianapolis and Chicago line?

A. It does—it rather unites with it there; they join there.

Q. Where are the shops of the road?

A. I couldn't say as to that; there are some shops at Monon, I know that.

Q. What do you know about the shops at La Fayette?

A. I don't know much about that; I never had any occasion to.

398 Cross examination:

Questions by Judge FIELD, of counsel for the plaintiff:

Q. Are you one of the attorneys in this case?

A. Yes sir.

Q. And have been from its first commencement?

A. Yes sir, in this case; I was not an attorney—I was not con-

nected with the original action wherein the Maguire's judgment was obtained.

Q. In this action for quieting title, and injunction, you have been in it from the start as attorney for the defendants, and since the sale, in a sense, somewhat, an attorney for yourself?

A. Yes sir.

Q. You were present at the discussion of the issues before Judge Beeman at Knox, in Starke county, when an application for a temporary restraining order was involved?

A. Yes sir.

Q. You were well advised of all of the facts and the claims then made and since made up to the time of the sale of the railroad?

A. Just as presented.

Q. At the time you bought at the sheriff's sale you knew what the contention of the railroad company was?

A. Yes sir, practically so.

Q. With reference to this property down here that you have described on the plaintiff's map, have any of those buildings been erected since February 20th, 1896?

A. I don't think they have.

Q. They were all there prior to that time?

A. Yes sir.

Q. The uses that have been made of them since is the same as that that was made before?

399 A. Practically the same, yes sir.

Q. And the tenants occupying since February 20th., 1896, are substantially the tenants who were in occupancy before that date?

A. I believe they are the same ones; possibly that man Whittaker—I wouldn't say sure as to that.

Q. Speaking of the fence at the north end where the hay barn is, the hay barn next to the railroad track, marked Calvert hay barn?

A. Yes sir, Mr. Calvert used to occupy it.

Q. He was the original party?

A. Yes sir.

Q. The fence you spoke of, started at what point?

A. It started at the north west corner of the ground levied upon; I would say practically at a point fifty feet east of the center of the main track, and on the south line of Yellow street.

Q. And went south how far?

A. It went south about a hundred and sixty-five or a hundred and seventy feet I would judge.

Q. And east how far?

A. I don't believe there was any fence east.

Q. On the south line?

A. I don't think so; I wouldn't say certain, but if there was it is burned up; I don't think there is.

Q. Take it on the north line running east from the starting point, is there a fence there?

A. Yes sir, a wire fence, practically to the west line of Bill street.
Q. Is there any fence running to the south?
A. I believe there is.
Q. How far?
400 A. About the same distance as the west line.
Q. Wasn't that fence constructed by the party at the time to enclose the lot?
A. I couldn't say; I presume it was; it had that appearance.
Q. That was the only fence there was there, or that you observed there?
A. I believe it is the only fence.
Q. You and the sheriff undertook to determine by making your levy, what part of this was necessary for the railroad and what part was not, did you not?
A. I wouldn't say that we did.
Q. How did you come to leave out the stock pens and all the lands east of that up to Bill street?
A. It was being used by the railroad company.
Q. The stock pens didn't occupy all of it?
A. The stock pens and the entrance to the street did.
Q. You thought that was necessary for railroad purposes? Is that the reason you didn't make a levy upon it?
A. Yes sir.
Q. And that runs clear to east Bill street?
A. Yes sir, we didn't interfere with any getting to the stock pens.
Q. You and the sheriff determined that: no one else helped you; the railroad company wasn't a party to it?
A. No sir.
Q. You went down and determined that this strip of lands running where the stock pens are east to Bill street was necessary for railroad purposes and therefore ought not to be levied upon?
A. Yes sir.
Q. If you had concluded it was not necessary for railroad
401 purposes you wouldn't have made the jog, would you—you would have made it solid?
A. I wouldn't permit the sheriff to levy on anything that the railroad company was using.
Q. Or that you thought was necessary for railroad purposes, ain't that it?
A. No sir, I would put it like I put it—that the railroad company was using.
Q. What I want to get at, there is the stock pens and here is the railroad track, (indicating on the plat) and the side track and the stock pens, and here is a strip to Bill street, (indicating on plat) that you didn't include because you thought that was necessary for railroad purposes?
A. Yes sir, it shows on its face.
Q. That comes down to Bill street?
A. Yes sir.

—. Take the piece that covers what was originally the Haymond feed and lumber buildings, that runs down to within a very few feet of the side track, the levy does?

A. Yes sir, it is some,—I would judge it is seven feet from the sidetrack.

—. The levy there comes down to within seven feet of the side track?

A. Seven or eight feet.

Q. Is there any way of getting through between the sidetrack to the land you have designated as land levied on at the west?

A. The Haymond building occupies that space.

Q. They couldn't get through there without driving along lengthwise of the side track?

A. No sir, the building occupies this space.

Q. Does the building come clear down to within six or seven feet of the side track?

402 A. Yes sir, I would judge that it does.

Q. What was that building used for down at the side track?

A. It is an elevator; I don't believe it was an elevator at the time we levied on it; it is used for grain—in the grain business.

Q. Receiving grain from the cars and discharging grain to the cars?

A. In the usual and ordinary line of business by a man engaged in that business.

Q. Connected with the business of the railroad in shipping and receiving?

A. Naturally—and selling to the public; he sold to the public as well.

Q. How many years has that been used to your knowle-ge, in that way?

A. I believe that has been there ever since I knew the town.

Q. Twenty years or more?

A. Yes sir, I would judge so.

Q. When you got still further south you shortened the width of the piece of land levied on by somewhere in the neighborhood of fifty feet,—the east and west line?

A. Yes sir.

Q. What was the occasion of shortening up that line?

A. There was a driveway there that was used to get in to the side track I would judge.

Q. And on the line you have indicated in the levy, how much space is there between the west line of the levy at this point—the lot right east of the depot, (indicating on plat)?

A. It is between Montgomery and James street.

Q. How much space is there between the line designated in your levy, the west line, to the side track?

403 A. About fourteen feet; it is a good width of a driveway; I didn't include any part of that.

Q. How far is the west line of this piece that you levied on from the main track?

A. That would make it about eighty feet, I would judge from the center of the main track—from eighty to eighty five feet.

Q. And then going further south to the last piece, the northwest corner of your description contained in the levy, that comes right to the Prewett grain crib?

A. No it isn't the Prewett grain crib; that is that Whittaker—whatever his name is.

Q. Did you ever know Mr. Prewett?

A. Yes sir, I know Mr. Prewett, and I think probably Mr. Prewett could have used that in days gone by, but Mr. Whittaker uses it now.

Q. At that point how close did you go to the side track with your levy?

A. It is quite a distance.

Q. Have you ever made the measurement?

A. No sir, I never made the measurement; the side track there is drawn in pretty close to the main track.

Q. These irregular pieces described here in red lines,—these are the pieces that you and the sheriff deemed were unnecessary for railroad purposes?

A. Yes sir, they were the parts of that land that was being used for the business that I have described heretofore.

Q. Just answer the question; isn't it a fact that you and the sheriff determined those were unnecessary for railroad purposes?

A. Yes sir, there is no doubt about that.

By Judge WINFIELD:—

404 Q. You were asked on cross examination about if you at the time deemed them unnecessary for railroad purposes; I will ask you if at the time—what you thought about whether there would be any necessity of using any of this ground for railroad purposes?

Plaintiff objected to the question.

The court sustained the objection.

By Judge FIELD: The plaintiff will not dispute this state of facts on this question by witnesses, and will not put any witness on the stand on this question, because Mr. Hathaway has stated these locations, and we will dismiss our witnesses on that question.

Defendants offered in evidence the plat or map prepared by the plaintiff and used in the examination of the witness Medary Hathaway in identifying the location of buildings, etc.

(Identified by the reporter as Exhibit T.)

And the said map being then given in evidence and exhibited to the jury was the same that appears on the following page of this transcript.

(Here follows diagram marked page 404*a*.)

MAP(S) IS/ARE TOO LARGE TO BE FILMED

Evidence — E. H. Applegate.

EDMUND H. APPLEGATE a witness called on behalf of the defendants, after being first duly sworn, testified as follows, to-wit:

Examination in chief.

Questions by Judge WINFIELD, of counsel for the defendants:

Q. State your name to the court and jury?
A. Edmund H. Applegate.
Q. Where do you live?
A. At Francesville, Indiana.
Q. How long have you lived there?
A. Over twenty years in Francesville.
Q. What has been your business?
A. I keep a general store.
405 Q. Are you acquainted with this ground that was levied upon by the sheriff on an execution against the Monon road?
A. Yes sir, I think I know the parts that they levied on; I helped measure the ground.
Q. During the whole time you have lived at Francesville, have you ever known any part of this ground to be used by the railroad?

Plaintiff objected to the question, because it goes back to twenty years, and that is the time that Mr. Hathaway answered with respect to; the plaintiff will not put a witness on the stand on the subject.

By Judge WINFIELD: You will not attempt to dispute the fact?

By Mr. KRETZINGER: We will put no witness on the stand on the subject.

Defendants here rested their case.

Rebuttal—Lease of L., N. A. & C. to J. H. Prewett.

Plaintiff offered in evidence, in rebuttal, the lease of the Louisville, New Albany & Chicago Railway Company to John H. Prewett for the property at Francesville (Identified by the reporter as Exhibit R.)

Defendants objected to the introduction of this lease, because it is made in 1893, before the old company acquired title.

The court overruled the objection, to which ruling of the court, the defendants at the time, excepted, and the said lease being then read and given in evidence was in the words and figures following o-wit:

Exhibit R.

"This indenture, made this 18th day of April 1893 between The Louisville, New Albany & Chicago Railway Company, of the first part, and J. H. Prewett of Francesville, Pulaski county, Indi-
406 ana. of the second part, witnesseth, that said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter contained, hereby leases unto said party of the second part the following described real estate, to-wit:

Commencing at the southwest corner of Bill and Montgomery streets in the town of Francesville Indiana, thence southerly along the west line of said Bill sixty (60) feet thence westerly at right angles one hundred and fifteen (115) feet thence northerly parallel to said Bill street sixty (60) feet to, the south line of Montgomery street thence easterly along said south line of Montgomery street one hundred and fifteen (115) feet to the place of beginning.

And unless said railway company shall deem it necessary to use said ground, above described, for its own purposes, this lease shall continue *and* for the term of one year commencing on the 18th day April 1893, and ending on the 17th day of April 1894, and said premises, with the appurtenances, are to be occupied and used for the purpose of a grain house lumber sheds and office and for no other purposes.

In consideration of the premises, said party of the second part hereby covenants and agrees to occupy said premises in a careful, tenant-like manner, and to pay to said party of the first part for the rent thereof, without relief from val-ation or appraisement laws, the sum of one and $\frac{25}{100}$ dollars, per month payable monthly in advance, and to release said railway company from all damages by fire and other causes.

If, during the term aforesaid, or at any time thereafter, said company shall deem it necessary to use said ground for its own purposes, as above stated, then and in that event, upon giving to said
407 J. H. Prewett sixty days' notice of its intention so to do, it may take immediate and peaceful possession of said premises which possession J. H. Prewett hereby agrees to surrender to said railway company, and said party of the second part further agrees not to use said premises for any other purpose or purposes than those above set forth.

And also to surrender the premises at the end of said term, or the expiration of this lease, to the said party of the first part without notice, in as good condition as they now are, natural wear and decay and unavoidable accidents excepted; and in case of destruction of said property by fire this agreement to be at an end; and the said party of the second part further agrees not to sub-lease said premises or assign or transfer this lease or any part thereof, without the written consent of the party of the first part first obtained.

It is hereby understood and agreed, that if said party of the second part shall violate any of the agreements herein-contained, or if any part of said rent shall be in arrears ten days, that this lease shall be forfeited, and said party of the first part shall be entitled to the immediate and peaceable possession of the premises without notice.

It is further agreed that if the lessee shall, without objection from the lessor, continue to occupy the premises after the expiration of the aforesaid term, the provisions of this lease, so far as applicable, shall thereafter govern the rights and duties of the respective parties, except as to the time of such occupancy, and that said company may — any time terminate all the rights of the other hereunder by giving sixty days' notice.

In witness whereof, the parties have hereunto set their hands and seal-, the day and year first above written.

LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY,
By W. H. McDOEL, *General Manager.* [L. S.]
408 JOHN H. PREWETT. [L. S.]

STATE OF INDIANA, }
County of ——, } *ss:*

Before me —— —— a — in and for said county and State, personally came the within-named lessor and lessee, and acknowledged the execution of the foregoing lease.

Witness my hand and — seal, this — day of —— 188–.

—— ——.

I hereby acknowledge myself security for the performance of the covenants and conditions contained in the within lease on the part of the lessee.

—— ——.

(Endorsed on back:) Lease. (Short form) The Louisville, New Albany & Chicago Ry. Co. to J. H. Prewett Francesville. Received for record this 18th day of April A. D. 1893, at — o'clock — m., and recorded in Record — page —. —— —— recorder for —— county.

409 *Lease of C., I. & L. Ry. Co. to Jacob Myers.*

Plaintiff offered in evidence in rebuttal the lease of the plaintiff company to Jacob Myers, for the property at Francesville. (Identified by the reporter as Exhibit S.)

And the said lease being then read and given in evidence was in the words and figures following, to-wit:

EXHIBIT S.

"This indenture, made this 1st day of July 1897 between the Chicago, Indianapolis & Louisville Railway Co., of the first part, and Jacob Myers of Francesville, Pulaski county, Indiana, of the second part, witnesseth, that said party of the first part, in consideration of the covenants and agreements on the part of the said party of the second part hereinafter -ontained, hereby leases unto said party of the second part the following described real estate, to-wit: A piece of land at Francesville, Pulaski county, Indiana described as follows. Beginning at the northwest corner of the intersection of James and Bill streets Francesville thence north on the west line of Bill St. a distance of ninety (90) ft.: thence west to within ten (10) feet east of the center line of the said track of the Chicago, Indianapolis & Louisville Ry. Co. as now located, thence southerly parallel to said center line to the north line of James St. thence east on north line James St. to place of beginning.

And unless said railway company shall deem it necessary to the said ground above described, for its own purposes, this lease shall continue during and for the term of five years commencing on the 1st day of July, 1897 and ending on the 30th day of June, 1902, and said premises with the appurtenances, are to be occupied and used for the purpose of erecting and maintaining an elevator and storing grain, hay &c. and for no other purposes.

In consideration of the premises, said party of the second
410 part hereby covenants and agrees to occupy said premises in a careful, tenant-like manner, and to pay to said party of the first part for the rent thereof, without relief from valuation or appraisement laws, the sum of five ($5.00) dollars, annually payable in advance and releasing said Ry. from all losses resulting from fires or other causes.

If, during the term aforesaid, or at any time thereafter said company shall deem it necessary to use said ground for its own purposes, as above stated, then and in that event, upon giving to said Jacob Myers ninety (90) days' notice of its intention so to do, it may take immediate and peaceful possession of said premises, which possession said Jacob Myers hereby agrees to surrender to said Ry. company. And said party of the second part further agrees not to use said premises for any other purpose or purposes than those above set forth.

And also to surrender the premises at the end of said term, or the expiration of this lease, to the said party of the first part, without notice, in as good condition as they now are, natural wear and decay and unavoidable accidents excepted; and in case of destruction of said property by fire this agreement to be at an end; and the said party of the second part further agrees not to sub-lease said premises, or assign or transfer this lease or any part thereof, without the written consent of the party of the first part first obtained.

It is hereby understood and agreed, that if said party of the second part shall violate any of the agreements herein contained, or if any part of said rent shall be in arrears ten days, that this lease shall be forfeited, and said party of the first part shall be entitled to the immediate and peaceable possession of the premises without notice.

411 It is further agreed that if the lessee shall, without objection from the lessor, continue to occupy the premises after the expiration of the aforesaid term, the provisions of this lease so far as applicable, shall thereafter govern the rights and duties of the respective parties, except as to the time of such occupancy, and that the said company may at any time terminate all the rights of the other hereunder by giving ninety (90) days' notice.

In witness whereof, the parties have hereunto set their hands and seals, the day and year first above written.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY CO.,
By W. H. McDOEL, [L. S.]
Vice-Pres't & Gen'l Mangr.
JACOB MYERS. [L. S.]

STATE OF INDIANA, } ss:
County of ——, }

Before me —— —— a — in and for said county and State, personally came the within named lessor and lessee, and acknowledged the execution of the foregoing lease.

Witness my hand and — seal, this — day of —— 189–.

—— ——,
—— ——.

I hereby acknowledge myself security for the performance of the covenants and conditions contained in the within lease on the part of the lessee.

—— ——.

412 (*Em*dorsed on the back:) Lease. (Short form.) Chicago, Indianapolis & Louisville Railway Co. to Jacob Myers. Francesville Received for record this, 1st day of July A. D. 1897, at — o'clock — m., and recorded in record — page — —— —— recorder for —— county.

Plaintiff moved the court separately to strike out the return of the sheriff to the execution in the case of Patrick Maguire *versus* The Louisville, New Albany and Chicago Railway Company, and also to strike out from the evidence the deed of the sheriff under that levy and notice, for the reason that the description in both is so uncertain as to constitute an invalid conveyance. The court overruled

the motion, to which ruling of the court, the plaintiff at the time, excepted.

Plaintiff here rested its case.

Defendants here rested their case, and this was all the evidence given in the cause.

413 *Certificate of Reporter to Transcript.*

STATE OF INDIANA, }
White County, } ss:

White Circuit Court, April Term, 1899.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY }
vs.
PATRICK MAGUIRE ET AL. }

I, Lucy S. Taylor, official shorthand reporter of the White circuit court of the State of Indiana, do hereby certify that I am the official shorthand reporter of said court, duly appointed and sworn to report in shorthand the evidence of the causes, tried therein; that as such shorthand reporter, I took down in shorthand, in the above entitled cause, a full, true and complete report of all the evidence given and offered by the parties in said cause, and of the objections thereto, the rulings of the court thereon, and of the exceptions thereto; and I do further certify that the above and foregoing typewritten manuscript is a full, true and complete copy of the shorthand report of said evidence, the objections thereto, rulings of the court thereon, and of the exceptions, together with a full, true and complete copy of each and every written instrument read and given in evidence, and that said typewritten manuscript of said shorthand report of said evidence contains all the evidence given in said cause.

Witness my hand this 19th day of June 1899.

LUCY S. TAYLOR,
Official Shorthand Reporter.

414 *Transcript Filed.*

STATE OF INDIANA, }
White County, } ss:

White Circuit Court, April Term, 1899.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY }
vs.
PATRICK MAGUIRE ET AL. }

I, F. B. Humston, clerk of the White circuit court of the State of Indiana, do hereby certify that on the 6th day of July 1899, Lucy

S. Taylor official shorthand reporter of said court, filed in my office at the request and for the use of the plaintiff in the above entitled cause, the foregoing original typewritten manuscript of the evidence given in said cause as taken and certified by said official shorthand reporter of said court.

Witness my hand and the seal of said court, this 6th day of July, 1899.

F. B. HUMSTON,
Clerk White Circuit Court.

415 *Certificate of Judge.*

I, James V. Kent, special judge of the White circuit court of the State of Indiana in the cause of The Chicago Indianapolis and Louisville Railway Company *vs.* Patrick Maguire, Medary M. Hathaway, Philip Dellinger, sheriff of Pulaski county, Indiana, No. 902, do hereby certify that the above and foregoing long-hand transcript of the evidence and proceedings in said cause, made by Lucy S. Taylor, the official reporter of said court, is correct and contains all the evidence in said cause.

JAMES V. KENT,
Special Judge of the White Circuit Court of Indiana.

416 And be it further remembered that afterwards, on the 7th day of July, 1899, the plaintiff tenders to the court this its bill of exceptions in said cause and prays that the same may be approved, signed sealed and filed and made a part of the record in said cause.

JAMES V. KENT,
Special Judge of the White Circuit Court of Indiana.

Certificate of Judge.

And be it further remembered that after having so taken the said bill of exceptions under advisement and having examined the same and found the same to be correct and that the same contains all the evidence given in said cause, the said bill of exceptions is now this 10th day of July 1899, approved, signed sealed by me and ordered filed and made a part of the record in said cause.

JAMES V. KENT,
Special Judge of the White Circuit Court of the State of Indiana.

417 STATE OF INDIANA, }
White County, } *ss:*

I, Samuel L. Callaway, clerk of the White circuit court of Indiana, do hereby certify that the above and aforegoing transcript contains true and complete copies of all the papers and entries in said cause.

I further certify that on the 6th day of July 1899 Lucy S. Taylor, the official reporter of said court who took down the evidence in said cause, filed in my office her long hand manuscript of the evidence in said cause; that on the 10th day of July, 1899, James V. Kent, special judge of said court in said cause, attached to the said transcript, his certificate that the said transcript is correct and contains all the evidence in said cause; that the said transcript and certificate was incorporated into a bill of exceptions, which bill of exceptions was filed in my office on the 12th day of July 1899.

I further certify that I have incorporated in the above and foregoing transcript, the said original transcript of the evidence which is the same transcript which was filed in my office by the said official reporter and that the certificate of the said special judge attached to said reporter's transcript and incorporated herein is the original certificate attached to said transcript by James V. Kent, the special judge of said court in said cause.

I further certify that the said bill of exceptions containing the evidence in said cause so filed in my office on the 12th day of July 1899, is incorporated in the above and foregoing transcript without copying and that it is the same bill of exceptions which was so filed in my office as aforesaid.

418 In witness whereof, I have hereunto set my hand and the seal of the said White circuit court of Indiana this 8th day of August, A. D. 1899.

[SEAL.] SAM. L. CALLOWAY,
Clerk of the White Circuit Court of Indiana.

419 In the Supreme Court of Indiana.

CHICAGO, INDIANAPOLIS AND LOUISVILLE Railway Company, Appellant, *vs.* PATRICK MCGUIRE, M. M. HATHAWAY, and Phillip Dellinger, Sherrif- of Pulaski County, Indiana, Appellees.	Assignment of Errors. Filed Aug. 12, 1899. R. A. Brown, Clerk.

The appellant avers that there is manifest — in the judgement and proceedings in this cause, in this:

First. The court erred in sustaining the appellees' motion for a new trial as of right.

Second. The court erred in directing the jury to return a verdict in favor of appellees.

Third. The court erred in ordering appellant — make its second paragraph of amended complaint more specific.

Fourth. The court erred in striking out the second paragraph of appellant's amended complaint.

Fifth. The court erred in over-ruling appellant's motion for a new trial.

Wherefore appellant prays that the judgement be reversed.

E. C. FIELD,
G. W. KRETZINGER,
W. S. KINNAN, AND
SELLERS & UHL,
Attorneys for Appellant.

420 And afterwards, to-wit: on the 11th day of September, 1899, the same being the 98th judicial day of the May term 1899 of said court, the following further pleas and proceedings were had in said cause, to-wit:

Come now the parties, by their counsel, and this cause is submitted to the court for judgment and decree, as provided by the act of the General Assembly of the State of Indiana, approved April 13, 1885, and the rules of said supreme court adopted in relation thereto.

And afterwards, to-wit: on November 6, 1899, comes the appellant, by counsel, and files its brief (7) herein.

And afterwards, to-wit: on May 24, 1900, come the appellees by counsel, and file their motion to dismiss the appeal herein, and file proof of their notice to opposing counsel.

And afterwards, to-wit: on May 31, 1900, comes the appellant, by counsel, and files its answer to appellees' motion to dismiss the appeal herein.

And on the same day, comes the appellant, by counsel, and files its application for leave to amend the assignment of errors herein.

And afterwards, to-wit: on June 5, 1900, come the appellees, by counsel, and file their reply brief on motion to dismiss the appeal herein.

421 And afterwards, to-wit: on June 6, 1900, the same being the 9th judicial day of the May term, 1900, of said supreme court, come the parties by counsel, and the court being advised in the premises, overrules appellees' motion to dismiss the appeal herein.

And afterwards, to-wit; on June 30, 1900, come the appellees, by counsel, and file their brief (6) herein.

And afterwards, to-wit: on August 28, 1900, comes the appellant, by counsel, and files its reply brief (7) herein.

And afterwards, to-wit: on March 25, 1901, come the appellees, by counsel, and file their petition for an oral argument in said cause.

And afterwards, to-wit: on March 28, 1901, the same being the 106th judicial day of the November term 1900, of said supreme court, come the parties, by counsel, and the court being advised in the premises, transfers the above entitled cause to the appellate court for decision, which said cause is now numbered 3780 of said appellate court.

And afterwards, to-wit: on January 7, 1902, the said appellate court being advised in the premises, sets the said cause for oral argument on February 4, 1902, and seven notices are issued to counsel in said cause.

422 And afterwards, to-wit: on January 7, 1903, the same being the 39th judicial day of the November term 1902 of said appellate court, come the parties by counsel, and the court being advised in the premises, affirms the judgment of the court below with the following opinion pronounced herein by Henley, J.: (here insert).

423 HENLEY, *J.*:

This was an action commenced by appellant to quiet its title to a certain parcel of land situated in Pulaski county, Ind. The cause was tried by a jury. After the evidence was concluded the trial judge instructed the jury to return a verdict for appellees. The question presented here arises upon the motion for a new trial, and questions the action of the trial court in so instructing the jury. The facts upon which the instruction was based are not in dispute. Both appellants and appellees claim title through the Louisville, New Albany & Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany & Chicago Railway Company which were foreclosed in the United States circuit court for the district of Indiana, and through which foreclosure, and other conveyances following it, its title became vested. Appellee's title is claimed as follows: On the 24th day of September, 1896, the appellee Patrick McGuire recovered judgment in the White circuit court of Indiana against the Louisville, New Albany & Chicago Railway Company for $2,416.23 and costs. On the 16th day of October, 1897, the said McGuire caused an execution to be issued by the clerk of the White circuit court to the sheriff of Pulaski county. On the 18th day of October, 1897, the said sheriff levied the execution upon the real estate in dispute. On the 13th day of November, 1897, the sheriff sold this real estate at public sale, and the appellee Hathaway became its purchaser, and on the 23d day of November, 1898, the sheriff of Pulaski county executed

to him a deed. A transcript of the McGuire judgment had been filed in the Pulaski circuit court on the 28th of January, 1897.

It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Ind., and that the foreclosure and sale of the property of the Louisville, New Albany & Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany & Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after-acquired property, and therefore could not have been embraced within the foreclosure and sale under the proceedings in the United States court. An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale. There were three mortgages executed by the Louisville, New Albany & Chicago Railway Company,—one in 1886, one in 1890, and one in 1894; all being prior to the rendition of the McGuire judgment. In the mortgage of 1886 the description of after-acquired property is as follows: "Which may at any time hereafter during the continuance of this trust be acquired by the said railroad company for purposes connected with or appertaining to the railroad or railways above mentioned or described." The description of the after-acquired property in the mortgage executed in 1890 was in the following words: "And all that it may in the future add, construct, or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described." The description of the after-acquired property in the mortgage executed in 1894 was in the following words: "What may at any time before or after the date of this indenture be acquired by or for the said railway company for purposes connected with or appertaining to said railroads or railways hereby conveyed." The decree directing the sale of the Louisville, New Albany & Chicago Railway Company follows the description in the mortgage. The master's deed conveying the property does not vary the description as to after-acquired property. The property in dispute was properly acquired by the Louisville, New Albany & Chicago Railway Company after the execution of the above-described mortgages. The trial court determined that the undisputed evidence established that the land levied upon and sold to satisfy appellee's judgment was not used by appellant for railroad purposes; that it was not needed for such purposes, and that it was not properly a part of the "lay-out" of the road; and that therefore the clauses in the mortgages covering after-acquired property did not cover the property in dispute. The evidence shows that the particular parcel of land in dispute has never been used by the railroad company for railroad purposes;

that, while it is contiguous to and adjacent to the depot grounds of appellant, it has buildings located upon it which have been leased to different parties, and occupied and used as a barber shop, grocery, post office, and in other ways entirely foreign to the necessary means of operating the railroad.

In speaking of the property covered by the after-acquired clause in a mortgage given by a railway company, Mr. Short, in his excellent work on the Law of Railway Bonds and Mortgages, at section 209, says: "The lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside of the 'lay-out' of the road, which had been taken over by the company in order to acquire at a less cost the land actually needed for the line itself." A case very similar to the one under consideration is the case of Seymour *v.* Railroad Co., 25 Barb. 284. It involved a controversy between the judgment creditors and the purchaser of railroad property at foreclosure sale, and in that case, it was squarely held that all lands acquired by the railroad company after the execution of the mortgage which were not used for railroad purposes were not covered by the lien of the mortgage, and did not pass by the foreclosure and sale to the purchaser, but were subject to a lien of the judgment creditors. The court in that case, at page 312, said: "It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes; that in some instances whole lots were purchased to secure a right of way across them. If the railroad company for this purpose had purchased a lot of 10 or 100 acres, it cannot be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or for other legitimate purposes, the lien of the defendants' judgment must prevail." To the same effect, see Railroad Co. *v.* Parker, 143 U. S. 42 12, Sup. Ct. 364, 36 L. Ed. 66; Railroad Co. *v.* Coffin, 50 Conn. 150; Mississippi Val. Co. *v.* Chicago, St. L. & N. O. R. Co., 58 Miss. 896; Eldridge *v.* Smith, 34 Vt. 484; Shirley *v* Railway Co., 78 Tex. 136, 10 S. W. 543; Railroad Co. *v.* Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66; Humphreys *v.* McKissock, 140 U. S. 304, 11 Sup. Ct. 1022, 35 L. Ed. 595; Dinsmore *v.* Railroad Co., 12 Wis. 725; Farmers' Loan & Trust Co. *v.* Commercial Bank, 11 Wis. 207; Walsh *v.* Barton, 25 Ohio St. 28.

We think the trial court was right in instructing the jury, upon the evidence submitted, to return a verdict for appellees. Judgment affirmed.

424 It is therefore considered by the court that the judgment of the court below in the above entitled cause be in all things affirmed at the cost of the appellant.

And it is further considered and adjudged by the court that the

appellees recover of the appellant the sum of $— for their costs and charges in this behalf expended.

And afterwards, to-wit: on March 7, 1903, comes the appellant, by counsel, and files its petition and briefs (8) for a rehearing herein.

And afterwards, to-wit: on March 24, 1903, come the appellees, by counsel, and file their brief (8) on said petition for rehearing.

And afterwards, to-wit: on March 26, 1903, come the appellees, by counsel, and file their motion to strike appellant's petition for rehearing from the files in said cause.

And afterwards, to-wit: on April 1, 1903, the same being the 111th judicial day of the November term 1902 of said appellate court, come the parties by counsel, and the court being advised in the premises, overrules appellant's petition for a rehearing heretofore filed herein in the above entitled cause.

425 Be it remembered, that afterward, to wit: on the 23rd day of May 1903, the said Chicago, Indianapolis and Louisville Railway Company, appellant, filed in the appellate court of Indiana its petition for the allowance of a writ of error by the Supreme Court of the United States, the entry of said filing being in these words and figures, to wit:

Comes now The Chicago, Indianapolis and Louisville Railway Company, the appellant in the cause entitled The Chicago, Indianapolis and Louisville Railway Company against Patrick McGuire *et al.*, No. 3780, and files its petition for the allowance of a writ of error in these words and figures, to wit:

426 In the Appellate Court of the State of Indiana.

The Chicago, Indianapolis & Louisville Railway Company *vs.* Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, Sheriff of Pulaski County, Indiana.	No. 3780.

To any justice of the Supreme Court of the United States or the chief judge of the appellate court and presiding judge of division No. 1 of said court of the State of Indiana:

Petitioner, The Chicago, Indianapolis & Louisville Railway Company, respectfully represents that on or about the 8th day of November 1897, The Chicago, Indianapolis & Louisville Railway Company commenced a suit in the circuit court of Pulaski county, Indiana, against the defendants, Patrick McGuire, M. M. Hathaway and

Phillip Dellinger, sheriff of Pulaski county, Indiana, to quiet its title to certain lands and premises situated in the county of Pulaski, in the State of Indiana, particularly described in plaintiff's petition in said suit; and afterwards in response to process served upon them, the said McGuire, Hathaway and Dellinger, appeared and interposed among others the defense hereinafter mentioned in said action, and upon the trial of said cause in due course judgment was rendered by said circuit court in favor of said defendants. From the judgment so rendered by said circuit court, the said Chicago, Indianapolis & Louisville Railway Company appealed to the appellate court of the State of Indiana, where said cause upon ap-
427 peal was numbered and entitled as above; and afterwards, on to-wit, the 7th day of January, 1903, division No. 1 of said appellate court of Indiana rendered judgment whereby it affirmed the judgment of said circuit court, and rendered judgment in favor of said McGuire, Hathaway and Dellinger, and against said Chicago, Indianapolis & Louisville Railway Company, for all lands involved in said suit.

Afterwards, and in due time, said Chicago, Indianapolis & Louisville Railway Company, filed in said appellate court of Indiana its petition for a rehearing in said cause, and brief in support thereof, which was thereafter, to-wit, on the 1st day of April, 1903, by said court overruled and denied. Thereafter, and in due time, said Chicago, Indianapolis & Louisville Railway Company, applied in due form and as authorized by law to the supreme court of the State of Indiana, for a transfer of said cause, or a writ of error in said cause to said appellate court of Indiana, upon the ground and under facts hereinafter mentioned, which application was thereafter, to-wit, on the 13th day of May, 1903, by said supreme court denied, and the transfer of said cause and said writ so prayed for were refused; whereupon, the said judgment of the said appellate court of Indiana, which is the highest court of the State of Indiana in which a decision in said suit could be had, became and is now final.

Petitioner says that it is aggrieved by the said judgment of division No. 1 of the appellate court of Indiana, and the proceedings in said suit, and that in said judgment and proceedings had prior thereto in said cause, errors were committed to the prejudice of the petitioner, because it says there was in said suit drawn in question the validity of a statute and an authority exercised under the United States, and the decision in said suit was against their validity, and there was drawn in question the validity of a
428 statute, or a constitution of, or an authority exercised under a State, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision in said suit was in favor of their validity, and that titles, rights, privileges and immunities were in said suit claimed by petitioner under the Constitution and statutes of, and commissions held, and authority exercised under, the United States, and the decision in said court was against the titles, rights, privileges and im-

munities specially set up and claimed therein by petitioner under such Constitution, statutes, commissions and authorities, as will hereinafter more fully appear.

Petitioner says that upon the trial of said cause in said circuit court, The Chicago, Indianapolis, & Louisville Railway Company, the plaintiff therein, introduced in evidence a decree of the circuit court of the United States in and for the district of Indiana, rendered January 23, 1897, foreclosing three certain mortgages executed by the Louisville, New Albany & Chicago Railway Company, under whom the defendants in said suit claimed, one of said mortgages being executed to the Central Trust Company of New York and James Murdock as trustee; one of said mortgages being executed to the Farmers Loan & Trust Company and John H. Baker as trustee, and one of said mortgages being executed to the Central Trust Company of New York and John H. Stotsenberg as trustee, and ordering the sale of the property embraced in said mortgages; and also introduced other decrees and proceedings of said circuit court of the United States and its officers, showing sale of said mortgaged property pursuant to said foreclosure decree and specially set up and claimed at the time that said decree and proceedings in said circuit court of the United States embraced the property involved in this suit, and were effectual to vest the title to the same in those under whom the said Chicago, Indianapolis & Louisville Railway Company claimed; and afterwards, at the trial of said cause
429 the said court instructed the jury therein to return a verdict in favor of the said defendants and against the plaintiff, the petitioner herein, and to the said action and decision of the said court, the said Chicago, Indianapolis & Louisville Railway Company duly excepted, and upon its appeal to the said appellate court duly assigned such ruling of said circuit court as error, as shown by its assignments of error originally numbered 2 and 5; but said division of said appellate court overruled and refused to sustain said assignment of error, and confirmed such action of said circuit court.

Petitioner further says that at the trial of the said cause, and for the purpose of proving that the real estate described in its complaint therein was owned by the said Louisville, New Albany & Chicago Railway Company at the time of the execution of each of said several mortgages above mentioned, and was covered by and included in the said mortgages under that part of the descriptions therein which covered all property of any nature owned by the mortgagor at the time the said mortgages were made; and for the purpose of proving that said property was included in the decree of the said United States circuit court foreclosing said mortgages, where the said decree directed the sale of all property owned by the mortgagor company at the date of the execution of said several mortgages; and for the purpose of showing that by the sale of said property and execution of deeds by the receiver and special master making the sale and the orders and decrees of the said court subse-

quent to said decree, the said Chicago, Indianapolis & Louisville Railway Company offered in evidence a plat of the town of Francesville, Indiana, in which said town the said real estate in controversy is situated, executed in 1862 by one Allison, which had been duly recorded, by which said plat the said real estate became and was dedicated to the said railway company.

430 And for the same purpose the said plaintiff company offered to prove its possession of said property and the payment of taxes thereon since said time.

And for the same purpose, the said plaintiff company offered in evidence the said plat in connection with a deed for the said real estate recognizing the existence of said plat, which deed was executed by one Brooks and his wife, conceded to be the sole heirs surviving of the owner of said real estate at the time said plat was executed.

The court refused to permit the plaintiff to introduce said plat in evidence; the court refused to permit said plaintiff to prove possession of said real estate since possession of said plat; the court refused to permit the plaintiff to prove the payment of taxes or special assessments assessed against said real estate since the date of said plat and there was no evidence admitted at the trial of said cause in lieu of such evidence so excluded, or which proved the facts which would have been shown if such evidence had been admitted. To the action and decision of said circuit court in excluding said several items of evidence and in excluding each of them separately and severally, the said Chicago, Indianapolis & Louisville Railway Company duly excepted, and upon appeal to the said appellate court duly assigned said ruling of said circuit court as error, as shown by the assignment of error originally numbered 2 and 5. But said division No. 1 of the appellate court overruled and refused to sustain said assignment of error and affirmed said action of said circuit court.

Before the trial of said cause, the said Chicago, Indianapolis & Louisville Railway Company filed its amended complaint in two paragraphs. In the first paragraph of its said amended complaint, the said plaintiff company set up and claimed title to said real

431 estate in controversy in fee simple and charged that the defendants claimed an interest therein adverse to the title of the plaintiff; that such claim was unfounded and constituted a cloud on the title of the plaintiff. In the second paragraph of said amended complaint, the said plaintiff company charged that it was the owner of an easement in the said real estate. The said paragraph specifically averred the dedication of said property by said plat; and in detail told of the transfer thereof from the then existing corporation owning the same to the said Louisville, New Albany & Chicago Railway Company, and afterwards said company by force of the decree of the United States court for the district of Indiana, vested said title in the persons through whom by deed the petitioning company herein claims title to such interest in such property.

That the said circuit court upon the motion of the said defendants held that said paragraph of complaint was insufficient to show title in this plaintiff to the said property therein described, or any part of it, and directed that said paragraph be made more specific. Whereupon, the said plaintiff believeing that the said paragraph fully and sufficiently showed title to said easement in the petitioner herein by virtue of said plat and said decrees, refused to amend its said paragraph and because of such refusal the defendants were not required to answer it, and no issue was made upon said paragraph of complaint and the rights therein averred were denied to the petitioner. That the said petitioner, The Chicago, Indianapolis & Louisville Railway Company duly excepted to the said ruling of the said circuit court, and upon its appeal to the said appellate court, duly assigned such ruling of said circuit court as error, as shown by its assignment of error originally numbered 3 and 4. But said division of said appellate court overruled and refused to sustain said assignment of error, and affirmed such action of said circuit court.

432 Petitioner further says that each of the rulings above mentioned and complained of with others, were duly assigned as error in the application made as aforesaid by the said Chicago, Indianapolis & Louisville Railway Company to the supreme court of the State of Indiana for writ of error or transfer of said cause to it, but the same with the said application for a writ of error or transfer were overruled and denied by said supreme court.

Petitioner refers to the record of said cause, as filed in said appellate court, for further and more complete statements of the rulings and proceedings complained of, and the facts that specially set up and claimed the benefit of the decree aforesaid of said circuit court of the United States, and of the proceedings thereunder, and for the manner in which such claims were set up and made. And petitioner says that in the proceedings above mentioned in said cause, they specially set up and claimed title-, rights, privileges and immunities, under the Constitution and statutes of, and commission held and authorities exercised under, the United States, and the decision of said circuit court and of the said division of said appellate court, and of the said supreme court of the State of Indiana, were against the titles, rights, privileges and immunities, specially set up and claimed by the petitioner, The Chicago, Indianapolis & Louisville Railway Company, in said cause.

Petitioner refers to the assignment of errors filed herewith and prays that the same may be considered for the purposes of this application as a part hereof, and further prays that a writ of error may be allowed and issued herein to the said appellate court in and for Indiana, which now has the record in said cause, for the removal of said cause to the Supreme Court of the United States, to the end that the error in said judgment and the proceedings in said cause may be duly corrected, and full and speedy justice done to the par-

ties aforesaid in this behalf, and that the transcript of the
433 record, proceedings and papers in said cause duly authenticated, may be sent to said Supreme Court.

E. C. FIELD,
G. W. KRETZINGER,
H. R. KURRIE,
Attorneys for the Chicago, Indianapolis & Louisville Railway Company.

Allowed this 23rd day of May, 1903.

FRANK S. ROBY,
Chief Judge of the Appellate Court of Indiana.
JAMES B. BLACK,
Presiding Judge Division No. 1 of the Appellate Court of Indiana.

434 [Endorsed:] In the appellate court of Indiana The Chicago, Indianapolis & Louisville Ry. Co. *vs.* Patrick McGuire *et al.* Petition for writ of error. Filed May 23 1903 R. A. Brown clerk.

435 Be it further remembers, that afterward, to wit: on the 23rd day of May, 1903, the said Chicago, Indianapolis and Louisville Railway Company, appellant, filed in the appellate court of Indiana, the writ of error issued by the Supreme Court of the United States, the entry of said filing being in these words and figures, to wit:

Comes now The Chicago, Indianapolis and Louisville Railway Company, the appellant in the cause entitled The Chicago, Indianapolis and Louisville Railway Company against Patrick McGuire, *et al.*, No. 3780, and files the writ of error issued by the Supreme Court of the United States, which writ of error is in these words and figures, to wit:

436 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the appellate court of the State of Indiana, Greeting:

Because on the record and proceedings, as also on the rendition of a judgment in a plea which is in the said appellate court, before you, between The Chicago, Indianapolis & Louisville Railway Company and Patrick McGuire, M. M. Hathaway and Phillip Dellinger, sheriff of Pulaski county, Indiana, a manifest error hath happened to the great damage of the said Chicago, Indianapolis & Louisville Railway Company, as by *his* complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid on this be-

half, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States circuit court of appeals for the seventh circuit, together with this writ, so that you have the same at Chicago, thirty days after the date hereof, in the said United States circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, this 23 day of May, A. D. 1903.

[Seal Circuit Court of the United States, State of Indiana.]

NOBLE C. BUTLER, *Clerk.*

[Endorsed:] Filed May 23 1903. R. A. Brown clerk.

437 Be it further remembered, that afterward, to wit: on the 23rd day of May, 1903, the said Chicago, Indianapolis and Louisville Railway Company, appellant, filed in the appellate court of Indiana the writ of error issued by the Supreme Court of the United States, the entry of said filing being in these words and figures, to wit:

Now comes The Chicago, Indianapolis and Louisville Railway Company, the appellant in the cause entitled The Chicago, Indianapolis and Louisville Railway Company against Patrick McGuire *et al.*, No. 3780, and files its appeal bond in these words and figures, that is to say:

438 Know all men by these presents, that we, the Chicago, Indianapolis & Louisville Railway Company, as principal, and James Murdock, as surety, are held and firmly bound unto Patrick McGuire, M. M. Hathaway and Phillip Dellinger, sheriff of Pulaski county, Indiana, in the full and just sum of five thousand dollars ($5,000), to be paid to the said Patrick McGuire, M. M. Hathaway and Phillip Dellinger, sheriff as aforesaid, their executors or assigns or successors in office, for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, trustees, assigns and receivers, jointly and severally by these presents.

Sealed with our seals, and dated this 23d day of May, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a term of the appellate court in and for the State of Indiana, in a suit pending in said court between The Chicago, Indianapolis & Louisville Railway Company, *as* appellant, and Patrick McGuire, M. M. Hathaway and Phillip Dellinger sheriff as

aforesaid, *were* appellees, a judgment was rendered in and by division No. 1 of said court against the said Chicago, Indianapolis & Louisville Railway Company for certain lands and premises described in its complaint in said cause, and the said Chicago, Indianapolis & Louisville Railway Company, having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid cause, and a citation directed to the said Patrick McGuire, M. M. Hathaway and Phillip Dellinger, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at Washington within thirty days of the date hereof.

439 Now, the condition of the above obligation is such, that if the said Chicago, Indianapolis & Louisville Railway Company shall prosecute its writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
By ELISHA C. FIELD, *Its General Solicitor*.
JAMES MURDOCK.

I approve the foregoing bond this 23d day of May, 1903.

FRANK S. ROBY,
Chief Judge of the Appellate Court of Indiana.
JAMES B. BLACK,
Presiding Judge Division No. 1 of the Appellate Court of Indiana.

Filed in the appellate court of the State of Indiana, this 23rd day of May, 1903.

R. A. BROWN, *Clerk.*

440 Be it further remembered, that afterward, to wit: on the 23rd day of May 1903, the said Chicago, Indianapolis and Louisville Railway Company, appellant, filed in the appellate court of Indiana, the writ of error issued by the Supreme Court of the United States, the entry of said filing being in these words and figures, to wit:

Now comes The Chicago, Indianapolis and Louisville Railway Company, appellant in the cause entitled The Chicago, Indianapolis and Louisville Railway Company against Patrick McGuire *et al.*, No. 3780, and files the citation on said writ of error duly served on the defendants in error, said citation and endorsement of service thereon being in these words and figures, towit:

441 THE UNITED STATES OF AMERICA, *ss*:

To Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, sheriff of Pulaski county, Indiana, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the appellate court of the State of Indiana, wherein The Chicago, Indianapolis & Louisville Railway Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of May, in the year of our Lord, one thousand nine hundred and three.

FRANK S. ROBY,
Chief Judge of the Appellate Court of Indiana.
JAMES B. BLACK,
Presiding Judge Division No. 1 of the Appellate Court.

We hereby accept service of the above and foregoing citation in error, and waive further service thereof, and further waive the insertion of the Christian names of the defendants in error.

Dated May 23, 1903.

____ ____,
____ ____,
____ ____,
Attorneys for Defendants in Error.

441½ This writ came to hand this 23rd., day of May, one thousand nine hundred and three, and I this day served the same on Charles C. Spencer, attorney for the above named Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, sheriff of Pulaski county, Indiana, by reading the same to him.

Witness my hand at Monticello, Indiana, this 23rd., day of May, one thousand nine hundred and three.

GEORGE STEPHENS,
Sheriff of White County, Indiana,
By H. E. McCULLY,
Chief Deputy.

Mileage	20
Service	40
Dock. & ret	20
	$ .80

442 [Endorsed:] In the appellate court of Indiana. The Chicago, Indianapolis & Louisville Ry. Co. *vs.* Patrick McGuire *et al.* Citation.

443 Be it further remembered, that afterwards, to wit: on the 23rd day of May, 1903, the said Chicago, Indianapolis and Louisville Railway Company, appellant, filed in the appellate court of Indiana the writ of error issued by the Supreme Court of the United States, the entry of said filing being in these words and figures, to wit:—

Comes now The Chicago, Indianapolis and Louisville Railway Company the appellant in the cause entitled The Chicago, Indianapolis and Louisville Railway Company against Patrick McGuire No. 3780, and by its counsel files its assignment of error, the entry of said filing being in these words and figures, to wit:

Now comes the appellant by *his* counsel and files its assignment of errors in these words and figures, to wit:

444 In the Appellate Court of the State of Indiana, Division No. 1.

THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY Company
vs.
PATRICK MCGUIRE, M. M. HATHAWAY, and PHILLIP Dellinger, Sheriff of Pulaski County, Indiana. } No. 3780.

Assignment of Error.

Now comes plaintiff in error in the above entitled cause, The Chicago, Indianapolis & Louisville Railway Company, and on writ of error from the Supreme Court of the United States says that in the record and proceedings in said cause there is manifest error.

1st. Plaintiff offered and the court admitted in evidence on behalf of plaintiff, the foreclosure proceedings had in the circuit court of the United States and district of Indiana, the decree of foreclosure and sale entered in said proceedings by that court, and the deeds made pursuant to said decree, under which plaintiff in error became the owner of the property involved in the above entitled suit. That the trial court and appellate court wholly disregarded the force and effect of said foreclosure decree and such evidence made thereunder and pursuant thereto.

2nd. That said State courts wholly failed and refused to give full force and effect to said foreclosure decree so entered by the circuit court of the United States as aforesaid, and wholly failed and refused to give any force or effect whatever to the proceedings

445 had under said decree and in the enforcement thereof; in this, that the railroad mortgages foreclosed by said decree in said circuit court of the United States, covered and included in its

description of the property therein conveyed the real estate here involved, and the decree foreclosing said mortgages so included in this description of the property covered by said mortgages and to be sold in satisfaction thereof, the piece of real estate here involved, notwithstanding which the said State courts wholly failed and refused to give such effect thereto.

3rd. That for the purpose of more fully showing that the real estate here involved was owned by the railroad mortgagor at the time of the execution of the mortgages so foreclosed as aforesaid, plaintiff in error offered in evidence on the trial of this cause in the trial court of said State, a plat of the town of Francesville, executed in 1862, by one Allison, which plat had been duly recorded, it appearing that such plat was both executed and recorded long prior to the execution of said foreclosed mortgages; and also offered evidence showing that the mortgagor of said railroad mortgages so foreclosed as aforesaid, had been in possession of and had paid taxes upon said property from the date of the donation of the land here involved to said mortgagor, which donation was made and shown upon said plat from the date of said plat and its recording down to the institution of the foreclosure proceedings aforesaid, in the circuit court of the United States for the district of Indiana, said proceedings to foreclose having been instituted in said court on the 12th day of November, 1896, which refusal plaintiff in error here assigns for error.

4th. That through said foreclosure proceedings, decree and sale, so entered and had in and through said circuit court of the United States for the district of Indiana, plaintiff in error became the lawful owner of the real estate here involved, and the judgment
446 of the State courts divesting the title of plaintiff in error thereto, constitute a refusal on the part of said State courts to recognize or to give full lawful force and effect to said proceedings, foreclosure decree and conveyances, in and through said Federal court, contrary to the Constitution and laws of the United States.

Wherefore, said plaintiff in error prays that the judgment of said courts of the State of Indiana, be reversed, and said *courts* remanded for such further proceedings as the Constitution and laws of the United States may require.

G. W. KRETZINGER,
E. C. FIELD,
H. R. KURRIE,
Attorneys for Plaintiff in Error.

447 [Endorsed:] In the appellate court of Indiana. The Chicago, Indianapolis & Louisville Ry. Co. *vs.* Patrick McGuire *et al.* Assignment of errors on writ of error. Filed May 23, 1903. R. A. Brown, clerk.

448 STATE OF INDIANA:

In the Appellate Court.

I, Robert A. Brown, clerk of the supreme court, and *ex-officio* clerk of the appellate court in and for the State of Indiana, hereby certify the above and foregoing to be a full, true and complete transcript of the record of the proceedings had, papers filed, (except briefs), motions decided, rulings made, opinions delivered, and judgment rendered, in the said appellate court of Indiana, in the cause entitled The Chicago, Indianapolis and Louisville Railway Company, appellant, against Patrick McGuire, *et al.*, appellees, and numbered 3780, as appears from the records and original papers on file in my office.

I further certify that the writ of error inserted in said transcript is the original writ of error issued by the Supreme Court of the United States and filed in said cause.

In witness whereof, I hereunto set my hand, and affix the seal of said appellate court, at the city of Indianapolis, Indiana, this 12th day of June A. D., 1903.

[Seal Appellate Court, State of Indiana.]

ROBT A. BROWN,
Clerk Appellate Court of Indiana.

449 In the Supreme Court of the United States.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY Company, Plaintiff in Error,
vs.
PATRICK MCGUIRE ET AL., Defendants in Error. } Cause No. 336.

In the above entitled cause the undersigned, attorneys for the petitioner in error and defendants in error in the above cause, agree that the two pages attached to this stipulation contain a true and correct copy of the proceedings had in the supreme court of Indiana in the above cause, and the certificate of the clerk of said court with reference thereto. We further agree that the Honorable James H. McKenney, clerk of the Supreme Court of the United States, may attach to the transcript of the record now on file in said court in said cause, the said two pages, as a part of said record before it is printed, and print the same as a part thereof as if said pages had been attached to said transcript as the last pages thereof before it was filed in said court.

E. C. FIELD,
Attorney for Plaintiff in Error.
W. H. H. MILLER,
Attorney for Defendants in Error.

450 And afterwards, to-wit: on April 25, 1903, comes the appellant, by counsel, and files its petition to transfer the above entitled cause to the Supreme Court for decision.

And afterwards, to-wit: on April 28, 1903, come the appellees by counsel, and file their answer to appellant's petition to transfer the above entitled cause to the Supreme Court for decision.

And afterwards, to-wit: on May 14, 1903, the same being the 148th judicial day of the November term 1902 of said court, come the parties by counsel, and the Supreme Court being advised in the premises, denies appellant's petition to transfer the above entitled cause to that court for decision.

451 STATE OF INDIANA, }
Supreme Court. }

I, Robert A. Brown, clerk of the supreme court, and *ex-officio* clerk of the appellate court in and for the State of Indiana, certify that the above and foregoing is a full, true and complete copy of the proceedings in the supreme court in cause No. 3780, Chicago, Indianapolis and Louisville Railway Company *v.* Patrick McGuire, *et al.*, as appears from the original entries on the dockets of the said supreme court.

In witness whereof, I hereto set my hand, and affix the seal of said supreme court, at the city of Indianapolis, Indiana, this 7th day of July, 1903.

[Seal Supreme Court, State of Indiana, MDCCCXVI.]

ROBT A. BROWN,
Clerk Supreme Court of Indiana.

452 [Endorsed:] Chicago, Indianapolis & Louisville Railway Company, plaintiff in error *vs.* Patrick McGuire, *et al.* defendants in error. Stipulation

453 [Endorsed:] File No. 18,987. Supreme Court U. S. October term, 1903. Term No. 336. Chicago Indianapolis & Louisville Railway Co. P. E. *vs.* Patrick McGuire *et al.* Stipulation & addition to record. Filed July 18", 1903.

Endorsed on cover: File No. 18,987. Indiana appellate court. Term No. 69. The Chicago, Indianapolis and Louisville Railway Company, plaintiff in error, *vs.* Patrick McGuire, M. M. Hathaway, & Phillip Dellinger, sheriff of Pulaski county, Indiana. Filed June 29, 1903.

IN THE SUPREME COURT OF THE UNITED STATES.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,
vs.
PATRICK MCGUIRE ET AL., Defendants in Error.
No. 69.

In the above cause it is hereby agreed between counsel for plaintiff and defendants in error, that the certified copy of the plat of the town of Francesville, which appears in the printed record between pages 12 and 13 thereof, and which is marked page *21a*, instead of being in the record at said place ought to be in the record between pages 38 and 39 of the printed record, instead of the plat which is now at said place and marded page *62b*; said plat last above mentioned being in fact the plat which was "Exhibit A" to the second paragraph of complaint and which ought to appear where said plat marked page *21a* now is.

It is agreed that the original record in said cause showed said plat marked page *21a* in the bill of exceptions at the place where said plat marked *62b* appears in the printed record. It is agreed that the said printed record may be regarded as corrected so this cause may be heard and determined the same as if said plat marked page *21a* was in fact at the place where said plat marked page *62b* now is, and said plat marked *62b* at the place where said plat marked *21a* now is. But it is not considered by defendants in error that said second paragraph of amended complaint is properly in the record.

E. C. FIELD,
H. R. KURRIE,
Attorneys for Plaintiff in Error.
CHAS. C. SPENCER,
M. WINFIELD,
W. W. W. MILLER,
Attorneys for Defendants in Error.

[Endorsed:] In the Supreme Court of the United States. No. 69. Chicago, Indianapolis & Louisville Ry. Co., plaintiff in error, *vs.* Patrick McGuire, *et al.*, defendants in error Agreement for correction of plat in printed record.

[Endorsed:] File No. 18,987. Supreme Court U. S., October term, 1904. Term No. 69. The Chicago, Indianapolis & Louisville Railway Co., P. E., *vs.* Patrick McGuire *et al.* Agreement for correction of plat in printed record. Filed Nov. 7", 1904.

FILE COPY.

IN THE

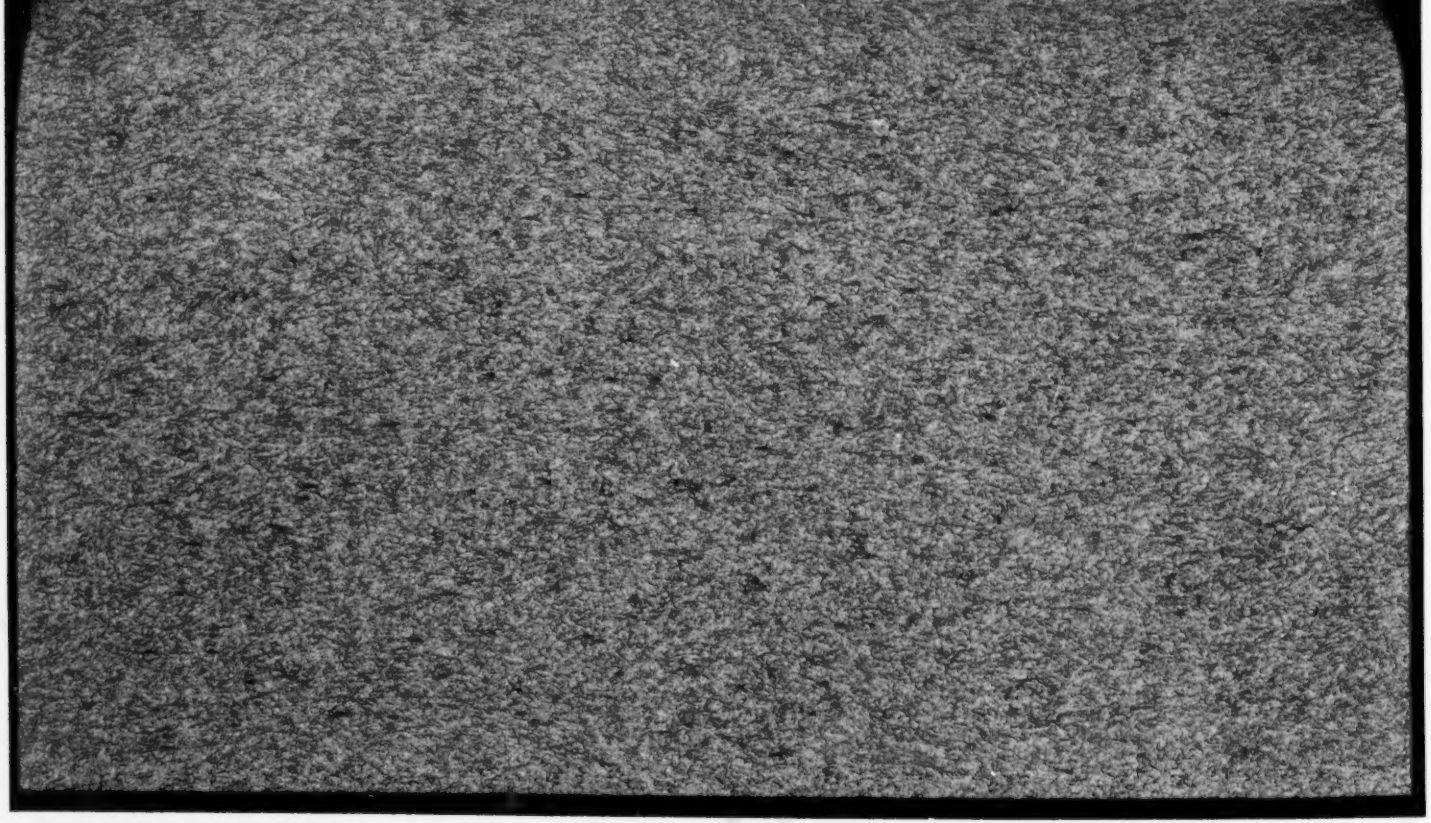
Supreme Court of the United States.

No. [illegible] (Oct.)

[illegible]

[illegible]

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1903.

No. 336.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

vs.

PATRICK McGUIRE et al.,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

THE APPEAL SHOULD NOT BE DISMISSED. THERE IS JURISDICTION. ENOUGH OF THE RECORD IS NOT PRINTED.

We have carefully gone over the suggestions of the learned counsel for defendants in error, in support of their motion for a dismissal or affirmance of this cause. We are not able to agree with his conclusion that the only possible effect of suing out the writ of error is delay, but we do contend that there is here involved a federal question; that it has been decided, and that in this decision is error.

Unfortunately, defendants in error have entirely failed to print that part of the record which does present the question.

The evidence shows that plaintiff and defendants in error claimed title to the real estate in controversy through the Louisville, New Albany & Chicago Railway Company. Plaintiff claimed through a mortgage executed by that company, a decree of foreclosure thereof, entered in the Circuit Court of the United States for Indiana; a sale thereunder, and a subsequent deed from the special master and receiver, executed on order of said court. Defendants claimed under an execution sale, and deed thereon, on a judgment against said company. The descriptions in the decree of the court were substantially the same as in the mortgages. These mortgages, and especially one executed in 1890 (before the date of the judgment through which defendants claim), purported to convey all property then owned or thereafter acquired. The material parts of this description are as follows:

> "*All the present and in the future to be acquired railway system and property of the said party of the first part, of every kind and nature*, and however owned, held, leased or enjoyed, together with all the equipment, appurtenances and franchises now owned or at any time hereafter to be acquired by it, more particularly described as follows: * * * (here follows an enumeration in a general way of the property now owned, and as a part of this particular description is the following) * * * and all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described * * * (then follows a specific enumeration or other items of property, the conclusion of this description being as follows) * * * *it being intended, and hereby expressly covenanted, that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action*, contract rights and franchises *which the railway company now owns, or at any time hereafter may*

own, as fully, and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein and conveyed hereby."

This description, as here set out, is taken from the decree of foreclosure in the Circuit Court of the United States, as shown in the original transcript filed in the office of the clerk of the Appellate Court of Indiana. (See said record, pp. 206, l. 6 to 11, and pages following, and pp. 209, l. 11 to 18.)

The court, in its decree, ordered all of said mortgaged property, including all property "conveyed thereby, and upon which said mortgage is a lien" be sold to pay the debt secured thereby. (See said transcript, pp. 218, l. 2 to 26.)

A special master was appointed to conduct the sale, and convey the property to the purchaser. The receiver of the property was also directed to convey all property in his hands to the purchaser, (pp. 228, l. 3 to 25).

The special master reported sale to the grantors of the plaintiff in error, with deed, and the sale was approved by the court. (P. 236, l. 18 to 237, l. 5.)

In the deed thus approved the special master conveyed to the purchasers:

> "All the railway system and property of every kind and nature, formerly of the Louisville, New Albany and Chicago Railway Company (P. 241, l. 19), * * * and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate * * * which at the time of the entry of the decrees aforesaid was owned or possessed by said railway (P. 243, l. 23), * * * all estate, right, title and interest of said railroad or railway companies, and each of them, in and to any and all real estate * * *." (P. 243, l. 17.)

The purchasers conveyed to the plaintiff in error, by deed, containing the same description as that made by the special master. (P. 247.)

For the purpose of proving that the mortgagor company owned the property at the date of each of the several mortgages foreclosed, and therefore the lien attached by reason of it covering all property "then owned," and the after acquired clause was not material, the plaintiff in error proved payment of taxes, and also the descriptions by which the property was listed. (See evidence of James N. Hayworth, pp. 270 to 293.) Also the same, to some extent, by witness Petrie, (P. 302, l. 13 to 310). But upon defendants objection the court finally refused to hear evidence of continuous possession or payment of taxes. (P. 295, l. 27.)

This witness also testified that the depot was erected there before 1865 and had ever since been maintained.

The plaintiff in error also offered in evidence a plat made in 1862, upon which the property here in dispute is designated as "depot grounds," and the location of the railway buildings thereon is indicated, and their presence is recognized in the statement of the party making the plat.

This plat was excluded because it was not shown that the party who executed it owned the property, and for other reasons. (P. 60.)

It is claimed that this plat has been legalized, and was competent evidence without further verification. Also that it is valid, and with the admitted evidence of continued possession showed ownership before the date of either of the mortgages through which plaintiff in error claims.

Defendants in error introduced as their evidence all of the entries and files in an action by Patrick McGuire against said Louisville, New Albany & Chicago Railway Company, mortgagor, in which judgment was entered against it in September, 1896. This included an execution, upon which a part of the property here involved had been sold to M. M. Hathaway, defendant in error, and a subsequent deed by reason of this sale, conveying said part sold to him (pp. 315 to 391).

Defendants in error were also permitted to prove that the property covered by said sale was not used for railway purposes. This was over the objection of plaintiff in error (pp. 392, l. 21, and 393, l. 23).

In order to properly present the motion made by defendants in error, the partial print of the record should contain the following, which it does not contain:

> The decree of the Circuit Court of the United States, through which plaintiff in error claims, found at page 198; the report of sale by the special master, found at page 231; his deed to the purchasers, found at page 238; the deed of the purchasers to the plaintiff company, found at page 246; the deed of Brooks and wife to the mortgagor company, found at page 266; the evidence of witnesses Hayworth and Petrie, found at pages 295 and 270; the proceedings and sale through which defendants in error claim title, found at page 315 and pages following, and the evidence of witness Hathaway, found at page 392, and the certified copy of the plat of the Town of Francesville, together with its offer, and all proceedings with reference thereto, found at page 60.
>
> The references hereby made are to the places of beginning of the various items of evidence in the transcript on file in the Appellate Court of Indiana, to which both plaintiff and defendants in error have free access.

It was the contention of defendants in error that the mortgage did not cover, and therefore, the decree and sale did not convey to plaintiff in error the property in question, *because it was not used for railway purposes,* while plaintiff claims that it covered and conveyed *all property owned by the company at the date of the decree,* or before that day.

The Circuit Court of Indiana peremptorily instructed the jury trying the cause to find for the defendants in error. Plaintiff in error filed a proper motion for a new trial, alleging among other reasons, that the evidence did not sustain the verdict. This is the proper, and, in fact, the only way to present such a question for review under Indiana practice.

The Appellate Court of Indiana affirmed the action of the Circuit Court. The Appellate Court states the facts, as they appear from the evidence, with two exceptions. By a reading of this statement, in the opinion of the learned judge, speaking for that court, this court will see that the situation is as it has been before indicated in this brief. (See Partial Tr., pp. 10 to 12.)

The learned judge erred in stating that the property in question was acquired after the date of the several mortgages. The sole evidence was that the mortgagor company had been in possession since before 1865; had paid taxes since 1890, and a deed from one Brooks and wife made in 1896, but which referred to the plat of 1862 * * *, to which allusion has already made. As the record stands it does not appear just when the title was acquired, and if the plat, and other evidence, improperly excluded, had been admitted, it would have appeared that it has been owned by the company since before the date of either mortgage.

However, the greatest error into which the learned court fell, was after assuming that the property was "after acquired" that the clause set out in the opinion with reference to after acquired property was the *sole clause* in the various mortgages on this subject.

Without discussing the subject with reference to the other mortgages, the description in that of 1890, as embodied in the decree, is set out in part earlier in this brief. From this it appears that the clause upon which the court based its opinion is taken from the body of the specific description, when the granting or beginning clause, and declaration of intention at the conclusion, clearly cover *all property*, whether used for railway purposes or not, and whenever acquired. The error was in permitting this limited statement to control the other and more general ones.

That this error was harmful, and that it is rather the declaration of intention at the beginning and conclusion than the attempted particular description which is to govern, is shown by the opinion of this court in the case of *Alabama* v. *Montague*, 117 U. S., 602, 6 Sup. Rep., 611. There this court had to consider a mortgage containing an "all other property" clause. However, in that case, this general statement was found as a part of the specific description, just as the one relied on by the court is here, and, in announcing the true rule, says:

> "These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the precise place where they are found. * * *
>
> "*It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words, which include all that is in-*

tended to be conveyed, are not to be fritted away by any attempt at a description of each particular thing fairly included in the more general language. But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. If, for instance, the description of the property mortgaged had commenced by saying 'all the property of the grantor, real, personal and mixed, in the states of Alabama, Georgia, Mississippi and Tennessee, and had then attempted to enumerate this property, but had omitted some of it, this omitted would have passed, as in *Spindle* v. *Sherce,* 111 U. S., 544."

In view of this principle, it is clear that the granting clause in the mortgage of 1890, showing that it was the intention to cover "all the present and in the future to be acquired railway system and property," and in the summary of the description, where it is declared, "it being intended, and hereby expressly covenanted, that the lien of this indenture shall embrace all * * * real and personal property * * * which the railway company now owns, or at any time hereafter may own," are to be held to include all property of the corporation, and are not to be limited by the attempt at a specific description in the other parts of the mortgage.

As enough of the record to consider the motion is not printed, it should be denied.

THE PLAINTIFF IN ERROR DID SPECIALLY SET UP AND CLAIM TITLE THROUGH THE DECREE OF THE UNITED STATES COURT, AND THE SALE AND OTHER PROCEEDINGS THEREUNDER, AND AS THE TITLE OF THE MORTGAGOR COMPANY WAS ADMITTED BY ALL PARTIES, THE COURT COULD NOT HAVE DECIDED IT WITHOUT DETERMINING WHETHER IT PASSED BY SAID DECREE.

We have already shown that each party claimed title through the mortgagor company. The plaintiff in error, through the decree and sale in the action to foreclose the mortgages, and the defendants in error through the judgment, and execution sale against the mortgagor company. In view of these claims the *sole question* to be decided was whether the title passed by force of the decree or the execution sale, and the court could not decide the case without deciding this question.

It is the settled law in Indiana that parties claiming title through a common grantor admit the source of title, and in an action to quiet title it is only necessary to trace title to the common source.

Taber v. *Railway*, 15 Ind., 459, 465.
McWhorter v. *Heltzell*, 124 Ind., 129, 131.
Wilson v. *Peellee*, Admr., 78 Ind., 384, 387.
Smith v. *Bryan*, 74 Ind., 515.
Start v. *Clegg*, 83 Ind., 78.

It has been repeatedly held by this court, that if it appears that the State Court *must have considered and decided the Federal question*, in order to have rendered the conclusion which it did, it is sufficient to give this court jurisdiction, although the fact that such a question was presented and decided was not mentioned in the opinion.

In speaking of the duty of the complaining party to

"specially set up and claim" the right, which is relied upon to invoke federal jurisdiction, this court, in the case of *Green Bay, etc.*, v. *Pattern Paper Co.*, 172 U. S., 58, 19 Sup. Rep., 97, 100, speaking by Justice SHIRAS, says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. *It is sufficient if it appears from the record that such rights were especially set up and claimed in the state court in such manner as to bring it to the attention of that court.*"
>
> "The true and rational rule, this court said, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 143, 'is that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. In *Roby* v. *Colehour*, 146 U. S., 159, 13 Sup. Ct., 50, it was said that, 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right so set up was expressly denied, or that such was the necessary effect in law of the judgment.' *'If it appear from the record, by clear and necessary intendment, that the federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient.*"
>
> *Chapman* v. *Goodnow*, 123 U. S., 540.
>
> *Powell* v. *Supervisors*, etc., 150 U. S., 440.

In the late case of *Kennedy Mining Co.* v. *Argonaut Mining Co.*, 189 U. S., 1, 23 Sup. Rep., 501, 503, this court held that a federal question was sufficiently set up to give jurisdiction, from the simple fact that the plaintiff in error asserted a title through a statute of the United States. The court, on page 503, speaking by Mr. Chief Justice FULLER, saying:

"Plaintiff in error contended in the courts below that, by force of Secs. 2 and 3 of the act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent, because the end lines of the latter were not parallel to each other."

"The defendant in error contended that its title was not acquired under the act of 1872, but under the act of July 26, 1866, which did not require parallelism of end lines."

"Under these circumstances it is held by a majority of the court that a Federal question was so presented that we have jurisdiction."

The cases of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 375, and *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448, strongly support the principle for which we are here contending.

We might multiply authorities along this line, but that is unnecessary. The opinion of the learned judge in Indiana shows that the *sole title asserted by plaintiff in error* was that given by the decree and sale in the United States Court. This was an assertion of a Federal right, just as in the case last cited, the assertion of title by force of an act of Congress, was the assertion of such a right.

To specially set up and claim a federal right, it is not necessary to assert in so many words that a federal right or authority is relied on. In fact, such a bare assertion would avail nothing. By this it is meant that it must be presented to the various tribunals in such a way as to properly place the question before them for decision, according to the local practice rules. Where, as here, the right or authority relied on, is disclosed by the evidence, and a motion for a new trial is necessary, and the only way to present the matter of whether the verdict and judgment is right on the evidence, then that is the only way by which the question could be presented.

Counsel seem to be laboring under the impression that somewhere in the proceedings it must be asserted that the right is a federal one, and it is relied upon as such.

If plaintiff had endeavored to present the question in any way than by the specific assignment in the motion for a new trial, the Appellate Court would have refused to consider it, because it was not properly presented to the trial court for review.

In the case of *Layton* v. *Missouri*, 187 U. S., 356, cited by counsel, this court refused to consider the appeal, because the highest court of the state refused to pass upon the federal question for the reason that it was not properly submitted to the trial court for review. Of necessity, this means that the question shall be presented to the trial court in such a way as that, according to the rules of practice there governing, that court is called upon to pass upon the federal question.

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLATE COURT OF INDIANA DID CONSIDER AND DECIDE THE FEDERAL QUESTION HERE INVOLVED.

The learned judge of the Appellate Court, in stating the contentions of each of the parties, among other things says:

> "Both appellant and appellees claim title through the Louisville, New Albany and Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany and Chicago Railway Company, which were foreclosed in the United States Circuit Court for the District of Indiana, and through which foreclosure and other conveyances following it, its title became vested."

The court then states that appellees claim title through a judgment, execution sale and deed against said mortgagor company. Continuing, the court says:

"It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany and Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany and Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings in the United States Court. *An abstract question of law is, therefore, presented as to whether or not the property in dispute passed by the foreclosure and sale.*"

As there was no dispute whatever in the evidence, and the question was, therefore, an "abstract question of law," the trial judge in the Circuit Court held, that this real estate was not conveyed by the decree, and instructed the jury to find for the defendant. The Appellate Court proceeds to consider this action of the trial court, and holds, that upon the evidence, the action of the trial judge in so instructing the jury was proper. The court holds, that the undisputed evidence showed that the real estate in controversy was not used by the railway company for railway purposes. Then applying this undisputed fact to the mortgages, and the decrees based thereon, through which plaintiff in error claimed, that learned court held, that the description therein did not include the property here in controversy, and therefore appellant did not have title on account of such proceedings.

Perhaps the most conclusive answer to the contention of counsel is found in the case of *Missouri, etc.* v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448. In that case an action was brought in a State Court on an injunction bond given in connection with proceedings had in a court of the United States. The question in controversy was the items of expense to the successful litigant in the injunction case, which could be allowed in an action on the bond. It was claimed by plaintiff in error that the State Court erroneously allowed counsel fees in an action on the bond. Defendant in error urged that no federal right or question had been specially set up or claimed in the lower courts, and, therefore, denied the jurisdiction of this court. In deciding this question, this court, speaking by Mr. Justice WHITE, says:

> "We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error, that the Federal question relied upon was not raised below, and, therefore, is not reviewable here.
>
> "The general rule undoubtedly is that those Fedearl questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the State Court, intended to, and did assert such a Federal right in the State Court. But it is equally true that although the allegations of Federal right made in the State Court were so general and ambiguous in their character, that they would not in and of themselves necessitate the conclusion that a right of a Federal nature was brought to the attention of the State Court, yet, *if the State Court, in deciding the case, has actually considered and determined a Federal* question, although arising on ambiguous averments, *then a Federal controversy having been actually decided, the right of this court to review obtains.* * * *

*All that is essential that the Federal questions must be presented in the State Court in such a manner as to bring them to the attention of that tribunal. * * * And, of course, where it is shown by the record that the State Court considered and decided the Federal question, the purpose of the statute is subserved. And so controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the State Court, that it has been held, although the general rule is that the raising of a Federal question in a petition for a rehearing is too late, yet, when the question is thus raised, and it is actually considered and decided by the State Court, the right to review exists."*

"Now, it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, viz.: that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane,* 184 U. S., 497, *ante,* 657, 22 Sup. Ct. Rep., 372."

In the case last referred to the Supreme Court of Kansas held, that there was no federal question involved in the appeal; but this court held, that there was such a question, that it was actually decided by that court, and on this account this court had jurisdiction.

San Jose Land Co. v. *San Jose Ranch Co.,* 23 Sup. Rep., 487.

It is ordinarily held that the federal question must be set up or raised before a petition for a rehearing in the

court of last resort. But in the case of *Mallett* v. *North Carolina,* 181 U. S., 589, 21 Sup. Ct. Rep., 730, 731, this court, speaking by Mr. Justice Shiras held, that as the federal question raised on a petition for a rehearing was then considered and decided, it was sufficient to bring the case before this court for review.

As the Indiana court found in the record, "An abstract question of law, * * * as to whether or not the property in dispute passed by the foreclosure and sale"; and this abstract question of law was the sole one it considered and decided, it is clear that it did pass upon the federal question, that is, the "due effect" of said decree and sale, and this court can, therefore, review this decision to see whether the true and proper scope of the decree was limited or denied.

THE QUESTION OF WHETHER THE PLAINTIFF IN ERROR HAD TITLE TO THE DISPUTED PREMISES TURNED ON THE EFFECT OF THE DECREE OF THE UNITED STATES CIRCUIT COURT; UNDER SUCH CIRCUMSTANCES THIS COURT HAS JURISDICTION TO DETERMINE WHETHER DUE EFFECT WAS DENIED SUCH DECREE BY THE CONCLUSION OF THE STATE COURT THAT IT DID NOT EMBRACE THE PROPERTY HERE IN CONTROVERSY.

In his argument, counsel for defendant in error seems to concede that this court would have jurisdiction, if the federal right had been specially set up and claimed in the Indiana courts. However, in anticipation that such an inference is not intended, we will refer in a general way to a number of the decided cases, which we believe establish this proposition.

In the case of *Dupasseur* v. *Roshereau,* 21 Wallace 130, the plaintiff in error was claiming title to a piece of

real estate through a sale on execution by the United States marshal, to satisfy a judgment entered in the United States Court. The defendant in error was claiming title through a mortgage executed by the judgment defendant, with a decree in a State Court of Louisiana, and deed resulting from a foreclosure and sale thereunder.

The Supreme Court of Louisiana held, that the title of the defendant in error was good, and that of plaintiff in error was not. In holding that it had jurisdiction to review this proceeding on writ of error to the Snpreme Court of Louisiana, this court, on page 134, says:

> "Where a State Court refuses *to give effect to a judgment of a court of the United States,* rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised, which, under the act of 1867, may be brought to this court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States,* and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence, it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the State Courts."
>
> * * * * *
>
> "* * * whether the validity or due effect of a judgment of the State Court, or that of a judgment of a United States court is disallowed by a State Court, the Constitution and laws furnish redress by final appeal to this court.
>
> "We cannot hesitate, therefore, as to our jurisdiction to hear the case."

In the case of *Central Natl. Bank* v. *Stevens,* 169 U. S., 432, this court had to consider a case where the Court

of Appeals of the State of New York had enjoined the beneficiaries under a decree entered in a court of the United States, from proceeding thereunder. This court held, that it had jurisdiction to entertain such appeal, among other things, on page 460, saying:

> "Whether due effect has been given by a State Court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this court, or a writ of error to the Supreme Court of the state."

In the late case of *Pardee et al.* v. *Aldridge,* 189 U. S., 429, 23 Sup. Rep., 514, this court had to consider the exact question of jurisdiction which this case presents. In that case plaintiffs in error claimed to be the owners of certain real estate through decrees of the Circuit Court of the United States, entered in the foreclosure of certain mortgages executed by the Texas Trunk Railroad Company. The mortgage in that case differed from those in the case at bar, in, that it limited the lien to "property *used* for and *pertaining to* the operation of said railroad." The description of the property covered by the decree was general, just as it is here, including "all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might be thereafter acquired in the State of Texas, used for and pertaining to the operation of said railroad." (See record in that case, page 153.)

The property in controversy was certain acreage property in the City of Dallas, Texas. The plaintiff in error claiming that it came within the limitations of the mortgage, and the decree of the United States Court, which was in the language of the mortgage; the defendant in error claiming that it was not property "used for or pertaining to the operation of said railroad."

In holding that there was jurisdiction, this court, on page 515, says:

> "The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. *Dupassuer* v. *Rochereau*, 21 Wall., 130, 22 L., Ed. 588. See *Sweringen* v. *St. Louis*, 185 U. S., 38, 41; 46 L., Ed. 795, 797; 22 Sup. Ct. Rep., 569. As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss *the grounds upon which we think that there is jurisdiction*, and we shall proceed at once to the merits of the case."

This question has been repeatedly before this court, and in each instance it has been held that there was jurisdiction.

Embry v. *Palmer*, 107 U. S., 3.

Crescent Live Stock Co. v. *Butchers Union*, 120 U. S., 141, 146.

National Foundary & Pipe Wks. v. *Oconto Water Co.*, 183 U. S., 216; 22 Sup. Ct. Rep., 111, 118.

Pittsburgh, etc., Ry. v. *Long Island, etc., Co.*, 172 U. S., 493, 507; 19 Sup. Rep., 238, 244.

Jacobs v. *Marks*, 182 U. S., 583, 587; 21 Sup. Rep., 865.

THE FACT THAT THE FEDERAL QUESTION ARISES ON THE EVIDENCE IS NO OBJECTION TO THE JURISDICTION OF THIS COURT; AND THIS IS ESPECIALLY TRUE, WHERE, AS HERE, THE JURY WAS PRE-EMPTORILY INSTRUCTED TO FIND AGAINST THE FEDERAL RIGHT, AND THE QUESTION PRESENTED IS AN ABSTRACT ONE OF LAW.

We are aware of the rule that this court will not consider the evidence for the purpose of determining the proven facts, where there is a conflict; but this rule has no application in such a case as this. In this case the court will look to the evidence for the purpose of determining whether, in point of law, the judgment against the federal right can stand.

If the rule were otherwise, litigants would often be deprived of their rights; for there is no way to prevent a trial judge from instructing a jury to find one way or another, and upon such an instruction the only way to determine whether there was error is by considering the evidence.

The rule governing in such cases has often been announced by this court.

In indicating the different ways in which a federal question could be specially set up in the case of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 374, this court, speaking by Mr. Justice WHITE, says:

> "It is urged by the defendant in error that these contentions involve no federal question, and that if they do they were not sufficiently set up in the lower courts, and, therefore, this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below,

by the pleadings, *by the objections to evidence,* and by the request for instructions, and, indeed, as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact, in and of itself suffices to present the federal question, even if it had been otherwise ambiguously raised on the record, which is not the case."

This question was considered by this court in the case of *Lehnen* v. *Dickson,* 148 U. S., 71, 13 Sup. Ct. Rep., 481, 482, this court, there speaking by Mr. Justice BREWER, says:

> "It is true, if there be an agreed statement of facts submitted to the trial court, and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* v. *Kennicott,* 103 U. S., 554. Doubtless, also, cases may arise in which, without a formal special finding of facts there is presented a ruling of the court, *which is distinctly a ruling upon a matter of law,* and in no manner a determination of facts, or of inferences from facts, in which this court ought to, and will, review the ruling."

In the case of *City of St. Louis* v. *Western Union Telegraph Company,* 148 U. S., 92, 13 Sup. Ct. Rep., 485, this court had to consider an action by the City of St. Louis against the Telegraph Company for the amount of a license tax of $5 per pole which tha city had by ordinance imposed upon said company. At the close of the evidence the city made a motion that the court enter judgment in its favor for the amount shown to be due. In holding that whether this motion should have been granted or not presented a question for review, the court speaking by Mr. Justice BREWER, on page 487, saying:

> "At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to ques-

> tions arising upon the pleadings, or upon rulings made by the court during the progress of the trial. * * *
>
> "It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused and exception taken; and this, as was held in *Norris* v. *Jackson*, 9 Wallace, 125, presents a question of law for our consideration."

In *Lancaster* v. *Collins*, 115 U. S., 222, 225, 6 Sup. Ct. Rep., 33, 34, this court held, that it would look at the evidence for the purpose of determining whether a motion for a judgment by one of the parties should have been sustained. The court, speaking by Mr. Justice BLATCHFORD, saying:

> "This court cannot review the weight of evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 304, there was in controversy the title to a certain tract of land. The case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged that this court could not inquire into the title, but could only determine the correctness of the construction put upon the treaty, by said court, and that the judgment of said court would not be reviewed here, unless it appeared that a construction had been put upon the treaty. This court denied this position, on pages 357, 458, saying:

> "If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this

narrow construction; and there are the strongest reasons against it, founded upon the words, as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what the title is, and whether it have a legal validity? *From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty?* Is not the treaty, in both instances, equally construed, and the title of the party in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires, that the error upon which the Appellate Court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. *The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be reexaminable, or the case could never be presented to the court."*

In *Cunningham* v. *Ashley*, 14 How., 377, an action was brought to this court on writ of error to the Supreme

Court of Arkansas, the defendants claimed the legal title to the property in controversy, while the complainant claimed that he had a paramount equitable title thereto. This court examined all of the facts in the case with relation to their bearing upon the title of the parties, and at page 389, said:

> "The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties. Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued, were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void."

The decree of the Supreme Court of Arkansas was reversed.

Hyde v. *Booraem*, 16 Peters, 169, was an action for the possession of notes, which had been executed and deposited for delivery to the plaintiff on certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all of the evidence was sent up with the record. This court there called attention to the fact that it was without authority to review the rulings upon questions of fact, but it did consider the evidence, the reason therefor being given by Justice Story, on page 176, in these words:

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all of the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is, whether, in point of law, upon these facts, the judgment can be maintained."

The court then reviewed the facts, and concluded that the judgment of the court below was wrong, and reversed it.

In *Dower* v. *Richards,* 151 U. S., 658, Justice Gray, in an exhaustive opinion, says:

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but the competency and legal effect of evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

In the late case of *Pardee* v. *Aldridge, supra,* this court, considering a case in many respects similar to this one, did consider the evidence; not for the purpose of reviewing any conclusions of the lower court on disputed questions of fact, for there were none, but, as said by Justice Story, *supra,* for the purpose of determining *"whether in point of law, upon these facts, the judgment can be maintained."*

As it appears to us, as the Circuit determined that there was but a naked question of law presented, and this view was concurred in by the court from which this appeal is taken, the cause is before this court for the purpose of determining whether upon these undisputed facts the judgment can be sustained.

As is said by the Appellate Court of Indiana, in its decision of this case:

> "An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale."
>
> *C. I. & L. Ry.* v. *McGuire et al.,* 65 N. E., 932, 933.

In the case of *American Paper Bag Co.* v. *Van Nortwick,* 52 Fed., 752,

> "Upon the hearing in the court below, at the conclusion of plaintiff's case, no counter evidence being offered, defendants moved the court to strike out and exclude all evidence as not tending to sustain the issue on the part of the plaintiff. The court sustained the motion to which ruling the defendant duly excepted." (P. 753.)

The Circuit Court of Appeals, in holding that it could review the evidence on page 753, says:

> "This ruling and exception authorize the review of the evidence so far as essential to the question whether the facts proven made a *prima facie* case, sufficient, in the absence of counter evidence, to justify a recovery by the plaintiff."
>
> *Goulding* v. *Hammond,* 54 Fed., 639.

The situation where defendant offers no evidence, and where it does, but it raises no issue with that of the plaintiff, there is no conflict, are identical, and in each case the court will look at the evidence for the purpose indicated.

THE APPEAL IS PROPERLY PERFECTED FROM THE APPELLATE COURT.

As the Supreme Court of Indiana refused the petition of plaintiff in error to transfer this cause to it for revision and reversal of the decision of the Appellate Court, this appeal is properly here on writ of error to the said Appellate Court.

Missouri, etc., v. *Elliott,* 184 U. S., 530; 46 L. Ed., 673.

Rothschild v. *Knight,* 184 U. S., 334; 46 L. Ed., 573.

AUTHORITIES OF DEFENDANTS IN ERROR.

In the case of *Oxley Stove Co.* v. *Butler County,* 166 U. S., 648, it was held that a general allegation that a decree was void because it was passed against some persons who were dead, and others who had no notice, was not sufficient as a charge that it was in violation of the fourteenth amendment, providing that no person shall be deprived of his property without due process of law. It did not appear that any reference was made to the United States constitution, or that the plaintiff in error relied on it at any time. The state court did not consider or decide the question in the light of this constitution, and it was, therefore, held that the federal right was not "specially set up and claimed" as required.

However, the court did hold in that case that if the state court had passed upon the federal question there would be jurisdiction. (Page 660.)

In the case of *Columbia Water Power Co.* v. *Columbia Electric, etc., Co.,* 172 U. S., 475, the question involved was the validity of a statute, and this court held that that clause requiring the right to be specially set up and claimed did not apply to such a case. In the discussion the court announces the general principle governing where a right is claimed, where it must be specially set up and claimed.

In the case of *Jacobi* v. *Alabama,* 187 U. S., 133, defendant objected to the admission of the former evidence of a witness, at a second trial, claiming that under the constitution he was entitled to be confronted by the witness. That he referred to the constitution of the United States was not pretended, and the state court, in deciding the case, did not consider the urged federal question.

In the case of *Layton* v. *Missouri,* 187 U. S., 356, the state court refused to consider the alleged federal question because it was not properly presented. This court there said that it could not review the judgments of state courts where such courts "did nothing more than decline to pass upon the federal question because not raised in the trial court, as required by the state practice."

These cases are not within gunshot of the point here involved; but the last one does sustain our early contention, that when a federal question is presented according to the rules of local practice, so that, according to such rules, the local court is called upon to pass upon it, it is properly presented. In such cases it is not necessary to assert in a pleading, motion for a new trial or assignment of errors, that a federal right is asserted or relied on. If the evidence shows that the right claimed is a federal one, and if the record presents for review the question of whether a verdict and judgment against that right were proper, then it is "specially set up and claimed," and a holding against it is subject to review.

In neither of the cases cited by counsel did it appear that any federal right was mentioned or claimed at any time until this court was reached. While in the case at bar, the only title asserted by the plaintiff in error was that which it had through a decree and sale in a United States court, and that, of itself, makes the case one where "a title or right is claimed under an authority exercised under the United States."

Dupassner v. *Roshereau, supra.*

THE JUDGMENT SHOULD NOT BE AFFIRMED.

Defendants in error have urged as a single reason why the cause should be dismissed or affirmed, that the court does not have jurisdiction. But we are conscious of the fact that the prayer for affirmance would justify a ruling in their favor if the principles upon which the appeal would have to succeed have been decided adverse to plaintiff in error by this court; or if they are so preposterous as to show that the only purpose of the appeal is to delay defendants in the enjoyment of their rights. We therefore suggest some of the principles and authorities upon which we do rely, to show, not only that there is merit in the appeal, but that it ought to succeed, leaving for our brief on the merits a more elaborate discussion of these and other principles involved.

I.

In Indiana, since 1852, railway companies have been authorized to acquire any property needed for the purposes of the road, and also to receive as a donation, or in payment for stock, any real estate wherever situate.

Right of Way, Burns R. S., 1901, Sec. 5153.
Other purposes, Burns R. S., 1901, Sec. 5153.
For stock, Burns R. S., 1901, Sec. 5151.
Donation, Burns R. S., 1901, Sec. 5150.

II.

"The property in question *was properly acquired* by the Louisville, New Albany and Chicago Railway Company."

C. I. & L. v. *McGuire,* partial record, p. 13.

III.

As each party to this litigation claims title through the mortgagor company, neither can be heard to say that the property was not lawfully acquired by said company.

Taber v. *Railway,* 15 Ind., 459.

IV.

The mortgagor company was authorized to mortgage not only its railway system, but all of its other property, whether held at the date of the mortgage or afterwards acquired.

Burns Ind. R. S., 1901, Sec. 5212.

V.

The mortgages upon which the title of plaintiff in error is based, and especially that of 1890, was sufficient to include that here in controversy, whether used for railway purposes or not, and by the decree and sale it was vested in plaintiff.

Wilson v. *Boyce,* 2 Otto, 320; 23 L. Ed., 608.
Alabama v. *Montague,* 117 U. S., 602.
Short on Railway Bonds, Sec. 197.
Beach on Railways, Sec. 616.
Robinson v. *Railway,* 66 Pa. St., 160.
Cooper v. *Wolfe,* 15 Oh. St., 523, 530.

VI.

The plaintiff in error offered in evidence a plat of the Town of Francesville, showing the dedication of this property to the railway in 1862. This was excluded, because the one who executed it did so as "proprietor" and not as owner, and there was no evidence to show that he did own the dedicated property. All such plats have been legalized, and it was proper evidence. If admitted it would have been made to appear that this property was owned by the mortgagor at the date of each of the several mortgages, and passed as security under that part of the description covering all property then owned.

Burns R. S., 1901, Sec. 4238a.

Burns R. S., 1901, Secs. 4412, 4415.

CONCLUSION.

For the many reasons given there is jurisdiction, and the motion should be denied.

Respectfully submitted.

E. C. FIELD,
G. W. KRETZINGER,
H. R. KURRIE,
Attorneys for Plaintiff in Error.

OCTOBER, 1903.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1903.

THE CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error.
vs.
PATRICK McGUIRE, M. M. HATHAWAY and PHILLIP DELLINGER, Sheriff of Pulaski County, Indiana,
Defendants in Error.
No. 69.

In Error to the Appellate Court of the State of Indiana.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is an action to quiet title, instituted in the Pulaski Circuit Court of Indiana, by the Chicago, Indianapolis & Louisville Railway Company, as plaintiff, against Patrick McGuire, M. M. Hathaway and Phillip Dellinger, as defendants, to quiet its title to a tract of land situated in the Town of Francesville, in said county and state.

The plaintiff's complaint was an ordinary complaint to quiet title according to the Indiana practice (p. 7). There was a second paragraph of complaint specially reciting the title of the plaintiff in error (pp. 7 to 12). On motion of defendants in error, the court ruled that the

second paragraph of the complaint should be made more specific. The plaintiff in error excepted to this ruling of the court and stood upon it, declining to make the amendment. Because of this, said paragraph was no longer a part of the issues in the case (pp. 13, 14 and 15).

The case was submitted to the court for trial without the intervention of a jury, and the court made a special finding of the facts. The court also concluded as a matter of law, that the plaintiff in error was entitled to have its title to said tract quieted (pp. 15 to 24).

Afterwards, as they were permitted to do by the statute then in force, the defendants in error filed an application for a new trial as a matter of right. This application was granted, and the judgment entered in favor of the plaintiff in error set aside (pp. 24 and 25). At this point, upon the application of the plaintiff in error, the venue of the cause was changed from Pulaski to White County, Indiana (pp. 26 and 27).

The answers to the amended complaint as before filed were withdrawn, and the defendants in error filed an answer admitting the title of the plaintiff in error to a part of the tract in controversy and denying its title to the balance thereof (p. 30). Upon this issue the cause was submitted to a jury for trial (p. 31). At the close of the testimony the court directed the jury to find in favor of the defendants in error. Whereupon, the jury returned a verdict in their favor (p. 32).

The Motion for a New Trial.

The plaintiff in error filed its motion for a new trial of said cause, assigning thirteen reasons why the verdict should be set aside. In its motion there are the following causes assigned for a new trial:

1. The court erred in directing the jury to find for the defendant.

2, 3. Error in requiring the second paragraph of amended complaint to be made more specific.

4, 5, 6. The verdict of the jury is contrary to law and not supported by sufficient evidence.

7. Error in refusing to permit the plaintiff to read in evidence the town plat of the Town of Francesville, executed by Allison in 1862.

8. Error in permitting defendants to read in evidence the return of the sheriff on the execution issued on the judgment of the defendant McGuire.

9. Error in admitting the sheriff's deed issued on a sale by virtue of said judgment, executed by the sheriff of Pulaski County.

11, 12. Error in permitting the defendants to prove that this property had not been used for railway purposes.

13. Error in refusing testimony of witness Petre, as to the amount and payment of taxes in Francesville from 1891 to 1898, as the same was shown on the tax duplicate of the town (p. 33).

This motion was overruled and the plaintiff in error excepted to such ruling. Whereupon the court entered judgment in favor of the defendants in error; granted the prayer for appeal of plaintiff in error, and fixed the amount of the appeal bond and approved the surety (pp. 34 and 35).

THE EVIDENCE. TITLE OF PLAINTIFF IN ERROR.

In 1872, and before that time, there existed in Indiana a railroad corporation known as the Louisville, New Albany & Chicago Railroad Company. In that year, by a decree entered in the Circuit Court of the United States, all of the property of that corporation was ordered to be sold to pay and satisfy a mortgage theretofore executed by it (pp. 40 to 43). The sale was made as directed by this decree, and the special master executed a deed to the purchasers at such sale. This deed was approved by the court ordering the sale (pp. 44 to 46). To take over the property thus sold, the Louisville, New Albany & Chicago Railway Company was incorporated and organized (pp. 47 to 50). Afterward this company was consolidated with the Chicago & Indianapolis Air Line Railway Company, and by the terms of the consolidation, the new company took the name of the former one (pp. 50 to 56).

On the first day of January, 1886, the Louisville, New Albany & Chicago Railway Company executed a mortgage to the Farmers Loan & Trust Company, as trustee, covering its railway system, also all property thereafter acquired for its purposes, and all property then owned of every nature (pp. 56 to 69).

On the first day of May, 1890, said company executed a mortgage to the Central Trust Company, as trustee (pp. 71 to 94).

In the granting, or beginning clause of the description of this mortgage it provided that it should cover "all the present and in the future to be acquired railway system and property, of the said party of the first part, of every kind and nature, and however owned, held, leased or enjoyed, to-

gether with all equipment, appurtenances and franchises, now owned, or at any time hereafter acquired by it, being more particularly described as follows" (pp. 76 and 77).

After this there follows an attempted description of all of the property intended to be mortgaged. In this attempted specific description there is the provision as to after acquired property considered by the Indiana court.

In concluding the description, and for the purpose of making clear any obscurity which might arise on account of the words employed in the particular description, the mortgage provides:

> "It being intended and hereby expressly covenanted, that the lien of this indenture shall embrace and bind *all* railroads, *real and personal property*, chosen in action, contract rights and franchises which the *said railway company now owns, or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railway company, and were specifically described herein* and conveyed hereby." (Rec., 78.)

On the 1st day of September, 1894, this company executed a third mortgage to the Central Trust Company of New York (pp. 94 to 113).

The description of the property covered thereby is more comprehensive in the mortgage of 1890 than it is in either the mortgage of 1886 or 1894, the descriptions in the mortgages last mentioned as to future acquired property covering not only property acquired for railway purposes, but covering all property of every description owned by the corporation at the date of the mortgage. The mortgage of 1890 covers all property of every nature, whether owned at the date of the mortgage or not. If the claim of plaintiff in error cannot be sustained un-

der the provisions of the mortgage of 1890, it cannot be under the others, and it is for this reason that we have quoted liberally from the mortgage of 1890, and have not quoted from the others.

On the 23d day of January, 1897, the Farmers Loan & Trust Company filed a bill of complaint in the Circuit Court of the United States for the District of Indiana, to foreclose the said mortgage executed to it in 1886. At the same time by cross-bills the Central Trust Company of New York filed its complaint to foreclose the said mortgages executed to it in 1890 and 1894, said bills being filed in the said cause above mentioned. A decree of foreclosure was entered in said cause foreclosing each of the said mortgages, and ordering to be sold all the property covered or intended to be covered thereby (pp. 116 to 133).

It appears from the decree that before the date thereof, a receiver had been appointed to take charge of all property of the said mortgagor corporation. In describing the property which the special master was directed to sell on account of such decree, the court in its decree, after embodying the descriptions as they are in the mortgages, provides:

> "That by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through or under them * * * in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be embraced or included in said mortgage be foreclosed, and cut off and forever barred."

The same order was made as to each mortgage foreclosed. (P. 127.)

At such sale the property was struck off to Fredrick

P. Olcott, Henry W. Poor and Henry C. Rouse (pp. 134 and 135). The sale was approved by the United States Court, and the special master executed a deed conveying the said property to the said parties (pp. 139 to 143).

The deed executed by the said special master, and thus approved by the court in said cause, after describing the railway system and property as being conveyed, provided that it includes and conveys the following, to wit:

> "All the railway system and property of every kind and nature formerly of the Louisville, New Albany & Chicago Railway Company." (P. 141.)
>
> * * * * *
>
> "Also all estate, right, title and interest of said railroad or railway companies and each of them in and to any and all real estate; and all leasehold lands, with buildings thereon erected; and all and all manner of franchises of said railroad and railway companies of every kind and description, however derived and wheresoever situate, and all and all manner of real estate, or interest in real estate, wherever such real estate may be situate, and all and all manner of personal property, of whatever nature or description the same may be, which at the time of the entry of the decrees aforesaid was owned or possessed by said railway and railroad companies and each of them, whether within or without the State of Indiana." (P. 142.)

The said Olcott, Poor and Rouse, by their deed of date March 31, 1897, conveyed the said property which they received by virtue of the deed of the said special master to the plaintiff in error in this case (pp. 144 to 148). The plaintiff in error, as it appears from the record copy of its articles of association, is a railway corporation organized under the laws of the State of Indiana, in the year 1897 (pp. 150 to 155).

On the 20th day of February, 1896, one James C. Brooks, stated to be the only surviving heir of James C.

Brooks, deceased, together with his wife, made a deed of quit claim for the property in controversy in this action, to the Louisville, New Albany & Chicago Railway Company as grantee. Said deed, after describing the property, recites:

> "Said piece or parcel of land being the same platted and dedicated for depot grounds, and duly recorded April 8, 1862" (pp. 155 and 156).

The plaintiff in error proved by the deposition of the treasurer of Pulaski County, Indiana, that the property in controversy had been regularly scheduled by the mortgagor company as a part of its railroad property for taxation, in 1889 and all subsequent years up to and including the year 1897.

In the schedule filed by the said corporation, the said property was described as follows:

> "Schedule B. Railroad track. Belonging to or controlled by the Louisville, New Albany & Chicago Railway Company in Pulaski County, Indiana, April 1, 1896. Township, city and town. Salem Township. Francesville, part section. Sections 4 and 9, Township 29, Range 4. Description: Three lots (town), each 360x150, located on west side of Bill street, between Lyman and Yellow streets."

And said property was so described on the tax duplicates of said county during said years (pp. 158 to 164).

The original schedules filed by the said corporation and referred to in the said deposition are found at pages 166 to 169.

Samuel Petrie, a witness on behalf of plaintiff in error, testified that he had lived in Francesville since 1865. There was a depot building on the line of the railway at Francesville in 1865. It had the appearance of having been built ten or twelve years before. This

building was burned in 1878, and a new one constructed. There was also stock pens there when I went there in 1865. I think they had the appearance of having been constructed about ten years.

There are a number of buildings constructed in Francesville facing the depot grounds. The defendants in error admitted that it is all built up along on Bill street facing the west or the depot grounds. The ground in controversy is in front of these buiildngs, lying on the east side of Bill street. There were but few buildings there in 1865, but since then a number have been constructed.

The same conditions exist on the west side of this tract where buildings have been constructed facing it.

There was also introduced in evidence some photographs showing the buildings as they existed on the east and west side of this tract called the "Depot grounds," and facing this tract. The pictures were taken a few days before the trial of the cause (pp. 176 and 179).

Plaintiff in error introduced in evidence a lease for a part of the property in controversy, executed by the mortgagor company to J. H. Pruitt, in 1893 (pp. 241 and 242). Also a lease by the plaintiff in error for a part of the property in controversy to Jacob Myers. This lease was executed July 1, 1897 (p. 244).

The Evidence of Defendants in Error.

The defendants in error introduced in evidence the amended complaint; the answer; the special finding of facts by the court; its judgment in favor of the plaintiff; a writ of execution issued on said judgment to the sheriff of Pulaski County, defendant in error, Phillip Dellinger;

notice of sheriff sale; levy by the sheriff by virtue of said execution; and the sheriffs deed executed on account of a sale by reason of said execution and said levy, all in the case entitled *Patrick McGuire* v. *The Louisville, New Albany & Chicago Railway Company,* in which a judgment was entered against the said railway company in the Circuit Court of White County, Indiana, on the 24th day of September, 1896 (pp. 181 to 225). The sheriff levied October 18, 1897 (p. 196), sold the property November 13, 1897 (p. 200), executed deed on the sale November 22, 1898 (p. 205).

Defendants in error also proved by witness Medary Hathaway that the part of the real estate described in the complaint which had been sold by the sheriff and which is described in the answer of the defendants in error in said cause, and claimed by them by virtue of said sale, was not used by the railway company for railway purposes. This evidence was introduced over the objection of plaintiff in error.

Said witness testified that much of said property was occupied by other parties under lease executed to them by the said mortgagor company. Said witness also identified, and there was introduced in evidence as a part of his evidence, a plat of this district showing the location of lots and lands and description thereof, the same as in the Allison plat, which was offered and rejected (pp. 225 to 241).

The defendants in error offered to prove by E. H. Appelgate that during the twenty years that he had known the property that was sold by the sheriff and claimed by defendants in error, said property had not been used by the railway company. The witness did not testify because of this statement of counsel for the plain-

tiff in error: "Plaintiff objected to the question because it goes back to twenty years, and that is the time that Mr. Hathaway answered with respect to. The plaintiff will not be a witness on the stand on the subject." (p. 241.)

THE ISSUES, CLAIM OF THE PLAINTIFF IN ERROR.

Each of the parties to this litigation claim title to the real estate in controversy through the Louisville, New Albany & Chicago Railway Company.

The plaintiff in error claims that by statute in force in Indiana at the time the several mortgages foreclosed in 1896 were executed, the mortgagor company was authorized to mortgage all of its property whether acquired for railroad purposes or not, and whether it was possessed at the date of the mortgage or acquired after such date.

Plaintiff in error also claims that by reason of certain provisions in the statutes of Indiana, giving authority to railroads to acquire real estate in certain cases, they are authorized to acquire real property without reference to the use to which it is put or for which it is designed. That it may be acquired, although not used or intended to be used for railway purposes.

That as each party to this litigation claims its title through the mortgagor company, neither is in a position to contend that said corporation did not lawfully acquire the said property.

Plaintiff in error claims that the mortgage executed by the mortgagor corporation in 1890, and which was foreclosed by the decree of the United States Circuit Court for Indiana, covered this and any other property owned by the said mortgagor corporation in the State of Indiana, whether it was used for railway purposes or not.

That it covers the property here in controversy, whether it was acquired by said corporation before or after the date of said mortgage.

Plaintiff in error also claims that the decree of the court was broad enough to and it did direct the special master appointed to make sale, to sell all of the real estate of said corporation in Indiana. That the court thereby adjudged that this and all of the other property of the said corporation was covered by said mortgages.

That because of the said special master making sale, executing a deed to the purchasers at such sale, conveying to such purchasers all interest of the said corporation in any real estate wherever situate within or without the State of Indiana; which deed was approved by the court ordering the sale, it appears conclusively that the court adiudged said real estate here in controversy to be covered by the said mortgage, and the title thereto vested in the purchasers at such sale.

The plaintiff in error also claimed that there was error in the proceedings of the Circuit Court in excluding evidence of said property being listed for taxation in the Town of Francesville, of the description by which it was listed, and also of the payment of taxes and special assessments thereon by the mortgagor company from 1891 to and including 1897. That said court also erred in excluding the original plat of the Town of Francesville, executed by one Allison, which the plaintiff in error offered to introduce in evidence. If said plat had been admitted, it would have shown title to the property in controversy by dedication in 1862, and with such showing the said property would have been covered by each of the mortgages foreclosed by the provision covering all property wherever situate owned by the mortgagor at the date of the mortgage.

Because of the exclusion of this evidence, due effect was denied to the decree of the Circuit Court of the United States, if by it it would have been made to appear that the court was correct in adjudging that said property was covered by said mortgages and conveyed by said deed. So, too, due effect was denied to the said decree, by the judgment of the court to the effect that it was not included in said mortgages nor covered by said decree, for the reason that the description was not broad enough to include it.

Plaintiff in error claims that by said decrees and deeds, and the fact that each party hereto claims through the mortgagor company, its title to said property is established, and whatever lien the defendants in error had by virtue of the judgment is subordinated or nullified.

THE ISSUES, CLAIM OF DEFENDANTS IN ERROR.

Defendants in error claim that the descriptions in the mortgages only covered property used for railway purposes. That the decree and deeds were no broader than the descriptions in the mortgage, and therefore that this property did not pass by virtue of the foreclosure sale, but remained as the property of the mortgagor company and subject to his lien and execution.

THE EVIDENCE EXCLUDED.

Title of the Plaintiff in Error.

The plaintiff in error offered in evidence that which was represented to be a certified copy of the original plat of the Town of Francesville, Indiana, upon which the property here in controversy was indicated by the words "Depot grounds." The court refused to admit this

plat in evidence on the objection of defendants in error. The objection of the defendants in error was:

1st. There was nothing to show that the party who executed the plat, where he therein styled himself as proprietor of the unsold lots, ever had any interest in the property or a right to dedicate the same.

2nd. That the plat was void as a dedication because no grantee was named.

3rd. Because there was no sufficient description of the lands claimed to have been dedicated (pp. 38 and 39).

The plaintiff in error offered again after the introduction of its other evidence, to introduce in evidence the plat of the Town of Francesville before excluded. It was offered in connection with the Brooks deed. The occurrence at the time of this offer was thus recorded in the record:

> "Plaintiff reoffered in evidence the plat heretofore offered, marked Exhibit A, with the quit claim deed, made in February, 1896, in connection with it, the deed having already been introduced and read in evidence (marked Exhibit K) and plaintiff offered to introduce it in supplement of that, the deed from Brooks to the company.
>
> By the Court: What is the purpose of it, Judge Field?
>
> By Judge Field: The purpose is this: that the grantor in that deed, as Judge Winfield says—it is true, and I have no doubt he will prove it as he did on the other trial—that Brooks, deceased, was the owner in fee simple of the property, and that instead of disputing the title, or the easement, he confirmed it by this deed, and the effect of the deed was to date back to the time the plat was filed and give to the true owner whatever title the plat itself would give; if Brooks was the owner, then of course he ratified that entire plat; it is not necessary

for it to be made by the owner to be adopted by the owner.

Defendants objected to the introduction of the plat in evidence, for the reasons given, when the plat was first introduced or offered in evidence." (Pp. 180-181.)

Samuel Petrie, witness: That he had been town treasurer for six terms. The plaintiff in error offered to prove by him that the property here in controversy was entered of record upon his tax duplicates as the property of the said mortgagor company and taxed to it on the duplicates of said town in 1891. That it paid $80.34 taxes thereon at said time. The court refused to permit this evidence to go to the jury. The plaintiff in error offered to prove by this evidence that the property described on the duplicate is what is commonly known there as the "Depot grounds," the property in controversy. This evidence was excluded (p. 171).

The same entry for each year up to and including 1898, was offered in evidence, but excluded. Plaintiff in error also offered to prove that the said mortgagor had paid the taxes shown on said duplicate against said property during each year from 1891 to 1898, inclusive (p. 171).

Plaintiff in error also offered to prove by this witness that the mortgagor company had paid a special assessment of $1,641 levied against this property in 1896. This evidence was excluded (p. 172). And the same ruling was made with reference to a special assessment of $252, paid by said company (p. 173).

The plaintiff in error offered to prove by this witness that the property to which the assessment referred was what is commonly known as the depot grounds (p. 172). All of this offered evidence was excluded.

Assignment of Error.

1st. Plaintiff offered and the court admitted in evidence on behalf of plaintiff, the foreclosure proceedings had in the Circuit Court of the United States and District of Indiana, the decree of foreclosure and sale entered in said proceedings by that court and the deeds made pursuant to said decree, under which plaintiff in error became the owner of the property involved in the above entitled suit. That the trial court and Appellate Court wholly disregarded the force and effect of said foreclosure decree and such evidence made thereunder and pursuant thereto.

2nd. That said state courts wholly failed and refused to give full force and effect to said foreclosure decree so entered by the Circuit Court of the United States as aforesaid, and wholly failed and refused to give any force or effect whatever to the proceedings had under said decree and in the enforcement thereof, in this, that the railroad mortgages foreclosed by said decree in said Circuit Court of the United States, covered and included in its description of the property therein conveyed the real estate here involved, and the decree foreclosing said mortgages so included in this description of the property covered by said mortgages and to be sold in satisfaction thereof, the piece of real estate here involved, notwithstanding which the said state courts wholly failed and refused to give such effect thereto.

3rd. That for the purpose of more fully showing that the real estate here involved was owned by the railroad mortgagor at the time of the execution of the mortgages so foreclosed as aforesaid, plaintiff in error offered in evidence on the trial of this cause in the trial court of said state, a plat of the Town of Francesville,

executed in 1862, by one Allison, which plat had been duly recorded, it appearing that such plat was both executed and recorded long prior to the execution of said foreclosed mortgages; and also offered evidence showing that the mortgagor of said railroad mortgages so foreclosed as aforesaid, had been in possession of and had paid taxes upon said property from the date of the donation of the land here involved to said mortgagor, which donation was made and shown upon said plat from the date of said plat and its recording down to the institution of the foreclosure proceedings aforesaid, in the Circuit Court of the United States for the District of Indiana, said proceedings to foreclose having been instituted in said court on the 12th day of November, 1896, but said evidence was refused, which refusal plaintiff in error here assigns for error.

4th. That through said foreclosure proceedings, decree and sale, so entered and had in and through said Circuit Court of the United States for the District of Indiana, plaintiff in error became the lawful owner of the real estate here involved, and the judgment of the state courts divesting the title of plaintiff in error thereto, constitute a refusal on the part of said state courts to recognize or to give full lawful force and effect to said proceedings, foreclosure decree and conveyances, in and through said Federal Court, contrary to the Constitution and laws of the United States.

POINT I.

THE PLAINTIFF IN ERROR DID SPECIALLY SET UP AND CLAIM TITLE THROUGH THE DECREE OF THE UNITED STATES COURT, AND THE SALE AND OTHER PROCEEDINGS THEREUNDER, AND AS THE TITLE OF THE MORTGAGOR COMPANY WAS ADMITTED BY ALL PARTIES, THE COURT COULD NOT HAVE DECIDED IT WITHOUT DETERMINING WHETHER IT PASSED BY SAID DECREE.

We have already shown that each party claimed title through the mortgagor company. The plaintiff in error, through the decree and sale in the action to foreclose the mortgages, and the defendants in error through the judgment, and execution sale against the mortgagor company. In view of these claims the *sole question* to be decided was whether the title passed by force of the decree or the execution sale, and the court could not decide the case without deciding this question.

It is the settled law in Indiana that parties claiming title through a common grantor admit the source of title, and in an action to quiet title it is only necessary to trace title to the common source.

Taber v. *Railway*, 15 Ind., 459, 465.
McWhorter v. *Heltzell*, 124 Ind., 129, 131.
Wilson v. *Peelle, Admr.*, 78 Ind., 384, 387.
Smith v. *Bryan*, 74 Ind., 515.
Start v. *Clegg*, 83 Ind., 78.

It has been repeatedly held by this court, that if it appears that the state court *must have considered and decided the Federal question*, in order to have rendered the conclusion which it did, it is sufficient to give this court

jurisdiction, although the fact that such a question was presented and decided was not mentioned in the opinion.

In speaking of the duty of the complaining party to "specially set up and claim" the right, which is relied upon to invoke federal jurisdiction, this court, in the case of *Green Bay, etc.*, v. *Pattern Paper Co.*, 172 U. S., 58, 19 Sup. Rep., 97, 100, speaking by Justice SHIRAS, says:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. *It is sufficient if it appears from the record that such rights were especially set up and claimed in the state court in such manner as to bring it to the attention of that court.*"
>
> "The true and rational rule, this court said, in *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 143, "is that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. In *Robey* v. *Colehour*, 146 U. S., 159, 13 Sup. Ct., 50, it was said that, 'our jurisdiction being invoked upon the ground that a right or immunity specially set up and claimed under the constitution or authority of the United States has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right to set up was expressly denied, or that such was the necessary effect in law of the judgment.' *'If it appears from the record, by clear and necessary intendment that the federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient.'*"
>
> *Chapman* v. *Goodnow*, 123 U. S., 540.
>
> *Powell* v. *Supervisors, etc.*, 150 U. S., 440.

In the late case of *Kennedy Mining Co.* v. *Argonaut Mining Co.*, 189 U. S., 1, 23 Sup. Rep., 501, 503, this court held that a federal question was sufficiently set up

to give jurisdiction, from the simple fact that the plaintiff in error asserted a title through a statute of the United States. The court, on page 503, speaking by Mr. Chief Justice FULLER, saying:

> "Plaintiff in error contended in the courts below that, by force of Secs. 2 and 3 of the Act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent, because the end lines of the latter were not parallel to each other."
>
> "The defendant in error contended that its title was not acquired under the Act of 1872, but under the Act of July 26, 1866, which did not require parallelism of end lines."
>
> "Under these circumstances it is held by a majority of the court that a federal question was so presented that we have jurisdiction."

The cases of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 375, and *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448, strongly support the principle for which we are here contending.

We might multiply authorities along this line, but that is unnecessary. The opinion of the learned judge in Indiana shows that the *sole title asserted by plaintiff in error* was that given by the decree and sale in the United States Court. This was an assertion of a federal right, just as in the case last cited, the assertion of title by force of an act of Congress, was the assertion of such a right.

To specially set up and claim a federal right, it is not necessary to assert in so many words that a federal right or authority is relied on. In fact, such a bare assertion would avail nothing. By this it is meant that it must be presented to the various tribunals in such a way as to properly place the question before them for decision, ac-

cording to the local practice rules. Where, as here, the right or authority relied on is disclosed by the evidence, and a motion for a new trial is necessary, and the only way to present the matter of whether the verdict and judgment is right on the evidence, then that is the only way by which the question could be presented.

If plaintiff had endeavored to present the question in any way than by the assignment in the motion for a new trial, the Appellate Court would have refused to consider it, because it was not properly presented to the trial court for review.

POINT II.

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLATE COURT OF INDIANA DID CONSIDER AND DECIDE THE FEDERAL QUESTION HERE INVOLVED.

The learned judge of the Appellate Court, in stating the contentions of each of the parties, among other things says:

> "Both appellant and appellees claim title through the Louisville, New Albany & Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany & Chicago Railway Company, which were foreclosed in the United States Circuit Court for the District of Indiana, and through which foreclosure and other conveyances following it, its title became vested." (P. 250.)

The court then states that appellees claim title through a judgment, execution sale and deed against said mortgagor company. Continuing, the court says:

> "It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Indiana, and that the foreclosure and sale of the property of the Louisville, New Albany

> & Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany & Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause inserted in each mortgage intended to cover after acquired property, and, therefore, could not have been embraced within the foreclosure and sale under the proceedings of the United States Court. *An abstract question of law is, therefore, presented as to whether or not the property in dispute passed by the foreclosure and sale.*" (P. 251.)

As there was no dispute whatever in the evidence, and the question was, therefore, an "abstract question of law," the trial judge in the Circuit Court held that this real estate was not conveyed by the decree, and instructed the jury to find for the defendant. The Appellate Court proceeds to consider this action of the trial court, and holds that, upon the evidence, the action of the trial judge in so instructing the jury was proper. The court holds that the undisputed evidence showed that the real estate in controversy was not used by the railway company for railway purposes. Then applying this undisputed fact to the mortgages, and the decrees based thereon, through which plaintiff in error claimed, that learned court held, that the description therein did not include the property here in controversy, and therefore appellant did not have title on account of such proceedings.

Perhaps the most conclusive answer to the contention of counsel is found in the case of *Missouri, etc.*, v. *Elliott*, 184 U. S., 530, 22 Sup. Ct. Rep., 446, 448. In that case

an action was brought in a state court on an injunction bond given in connection with proceedings had in a court of the United States. The question in controversy was the items of expense to the successful litigant in the injunction case, which could be allowed in an action on the bond. It was claimed by plaintiff in error that the state court erroneously allowed counsel fees in an action on the bond. Defendant in error urged that no federal right or question had been specially set up or claimed in the lower courts, and, therefore, denied the jurisdiction of this court. In deciding this question, this court, speaking by Mr. Justice WHITE, says:

> "We are at the outset met by an objection that there is no jurisdiction to review the judgment of the Kansas City Court of Appeals. It is contended on behalf of the defendant in error that the federal question relied upon was not raised below, and, therefore, is not reviewable here.
>
> "The general rule undoubtedly is that those federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court, intended to, and did assert such a federal right in the state court. But it is equally true that although the allegations of federal right made in the state court were so general and ambiguous in their character that they would not in and of themselves necessitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet, *if the state court, in deciding the case, has actually considered and determined a federal* question, although arising on ambiguous averments, *then a federal controversy having been actually decided, the right of this court to review obtains.* * * * *All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal.* * * * *And, of course, where it is shown by the*

record that the state court considered and decided the federal question, the purpose of the statute is subserved. And so controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for a rehearing is too late, yet, when the question is thus raised, and it is actually considered and decided by the state court, the right to review exists."

"Now, it plainly appears that the Kansas City Court of Appeals considered that there was presented to it for decision the question whether, in an action brought in a state court on an injunction bond given in a court of the United States, the state court was bound to apply to such a bond the rule prevailing in the courts of equity of the United States, *viz.:* that attorneys' fees are not a proper element of damage. We say this is undoubted, since the opinion of the Kansas City Court of Appeals recites that such was the contention, and the court proceeded to consider and decide it. That this contention involved a claim of immunity under an authority exercised under the United States, reviewable in this court, we have recently decided in *Tullock* v. *Mulvane*, 184 U. S., 497, *ante*, 657. 22 Sup. Ct. Rep., 372."

In the case last referred to the Supreme Court of Kansas held that there was no federal question involved in the appeal; but this court held that there was such a question, that it was actually decided by that court, and on this account this court had jurisdiction.

San Jose Land Co. v. *San Jose Ranch Co.*, 23 Sup. Rep., 487.

It is ordinarily held that the federal question must be set up or raised before a petition for a rehearing in the court of last resort. But in the cases of *Mallett* v. *North Carolina*, 181 U. S., 589, 21 Sup. Ct. Rep., 730, 731, and *Leigh* v. *Green*, 24 Sup. Ct. Rep., 390. this court, speak-

ing by Mr. Justice SHIRAS, held that, as the federal question raised on a petition for a rehearing was then considered and decided, it was sufficient to bring the case before this court for review.

As the Indiana court found in the record, "An abstract question of law, * * * as to whether or not the property in dispute passed by the foreclosure and sale"; and this abstract question of law was the sole one it considered and decided, it is clear that it did pass upon the federal question, that is, the "due effect" of said decree and sale, and this court can, therefore, review this decision to see whether the true and proper scope of the decree was limited or denied.

POINT III.

THE QUESTION OF WHETHER THE PLAINTIFF IN ERROR HAD TITLE TO THE DISPUTED PREMISES TURNED ON THE EFFECT OF THE DECREE OF THE UNITED STATES CIRCUIT COURT; UNDER SUCH CIRCUMSTANCES THIS COURT HAS JURISDICTION TO DETERMINE WHETHER DUE EFFECT WAS DENIED SUCH DECREE BY THE CONCLUSION OF THE STATE COURT THAT IT DID NOT EMBRACE THE PROPERTY HERE IN CONTROVERSY.

In the case of *Dupasseur* v. *Roshereau*, 21 Wallace, 130, the plaintiff in error was claiming title to a piece of real estate through a sale on execution by the United States marshal, to satisfy a judgment entered in the United States Court. The defendant in error was claiming title through a mortgage executed by the judgment defendant, with a decree in a state court of Louisiana, and deed resulting from a foreclosure and sale thereunder.

The Supreme Court of Louisiana held that the title of the defendant in error was good, and that of plaintiff in error was not. In holding that it had jurisdiction to review this proceeding on writ of error to the Supreme Court of Louisiana, this court, on page 134, says:

> "Where a state court refuses *to give effect to a judgment of a court of the United States*, rendered upon the point in dispute, and with jurisdiction of the case and parties, a question is undoubtedly raised, which, under the Act of 1867, may be brought to this court for revision. *The case would be one in which a title or right is claimed under an authority exercised under the United States,* and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the Circuit Court and vesting it with jurisdiction; and hence, it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by state courts."
>
> * * * * *
>
> "* * * whether the validity or due effect of a judgment of the state court, or that of a judgment of a United States court is disallowed by a state court, the constitution and laws furnish redress by final appeal to this court.
>
> "We cannot hesitate, therefore, as to our jurisdiction to hear the case."

In the case of *Central Natl. Bank* v. *Stevens*, 169 U. S., 432, this court had to consider a case where the Court of Appeals of the State of New York had enjoined the beneficiaries under a decree entered in a court of the United States, from proceeding thereunder. This court held that it had jurisdiction to entertain such appeal, among other things, on page 460, saying:

> "Whether due effect has been given by a state court to a judgment or decree of a court of the

United States is a federal question within the jurisdiction of this court, on a writ of error to the Supreme Court of the state."

In the late case of *Pardee et al.* v. *Aldridge*, 189 U. S., 429, 23 Sup. Rep., 514, this court had to consider the exact question of jurisdiction which this case presents. In that case plaintiffs in error claimed to be the owners of certain real estate through decrees of the Circuit Court of the United States, entered in the foreclosure of certain mortgages executed by the Texas Trunk Railroad Company. The mortgage in that case differed from those in the case at bar in that it limited the lien to "property *used* for and *pertaining to* the operation of said railroad." The description of the property covered by the decree was general, including "all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might be thereafter acquired in the State of Texas, used for and pertaining to the operation of said railroad." (See record in that case, page 153.)

The property in controversy was certain acreage property in the City of Dallas, Texas. The plaintiff in error claiming that it came within the limitations of the mortgage, and the decree of the United States Court, which was in the language of the mortgage; the defendant in error claiming that it was not property "used for or pertaining to the operation of said railroad."

In holding that there was jurisdiction, this court, by Mr. Justice HOLMES, on page 515, says:

> "The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. (*Dupassuer* v. *Rochereau*, 21 Wall., 130, 22 L. Ed., 588. See *Sweringen* v. *St. Louis*, 185 U. S., 38, 41; 46 L. Ed., 795, 797; 22

Sup. Ct. Rep., 569.) As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss *the grounds upon which we think that there is jurisdiction,* and we shall proceed at once to the merits of the case."

The case of *Julian* v. *Central Trust Co.*, 24 Sup. Rep., 399, is very much in point. There upon decree of foreclosure in the United States Circuit Court for the Western District of North Carolina the property of the Western North Carolina Railroad Company was sold to the Southern Railway Company. The decree confirming the sale purported to vest in the purchaser all of the title of the mortgagor company. In an action brought in that state in a local court, some two years afterward a judgment was rendered, on account of an accident happening after the Southern Railway Company had taken charge of the operation of the property. The action was against the mortgagor company, and the Southern Railway Company was not a party to it. The mortgagor company was made defendant on account of a statute of that state to the effect that where the property of a railway company was so transferred, the domestic corporation from which it was transferred should continue liable for damages on account of its failure to discharge its duties, until another domestic corporation was organized, had taken over the property, and agreed to perform the duties owing by it.

After judgment the property which the decree had attempted to transfer was levied upon to satisfy these judgments. The local courts, and also the Supreme Court of North Carolina, held that the property was subject to sale to satisfy the judgments. That because of the statutes above referred to the decree was not effective to pass

title to the purchaser, as it was a non-resident corporation. At this point the Court of the United States, in which the decree was entered, and the sale confirmed, was asked by petition in the original case to stay proceedings under the judgments of the state court in which the attempt was being made to sell its property. The United States court held that its decree passed title, and that the state court and local officers should be restrained. On appeal to this court, this order was confirmed, this court, by Mr. Justice DAY, saying:

> "If the sheriff is allowed to sell the very property conveyed by the federal decree, such action has the effect to annul and set it aside, because, in the view of the state court, it was ineffectual to pass title to the purchaser. In such a case we are of the opinion that a supplemental bill may be filed in the original suit with a view to protecting the prior jurisdiction of the federal court, and to render effectual its decree. * * *
>
> "In such a case, where the federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding Sec. 720, Rev. Stat. (U. S. Comp. Stat. 1901, p. 581), restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. * * *
>
> "* * * The federal court in protecting the purchaser under such circumstances, was acting in pursuance of the jurisdiction acquired when the foreclosure proceedings were begun."

In conclusion the court says:

> "While recognizing the weight which should be given to the decisions of the Supreme Court of a state in construing its own laws, and being disposed to follow them and accept the conclusions reached in construing local statutes in every case of doubt, we are here dealing with a right or title conferred by authority of the decree of a federal court, which may be virtually set aside and held for naught if the prop-

erty awarded can be taken upon execution in suits to which the purchaser is not a party. *It is conceded that the federal right could be set up in the state court from which the execution issued, and, if denied, the ultimate rights of the parties can be determined upon writ of error to this court.*"

This question has been repeatedly before this court, and in each instance it has been held that here was jurisdiction.

Embry v. *Palmer*, 107 U. S., 3.

Crescent Live Stock Co. v. *Butchers Union*, 120 U. S., 141, 146.

National Foundry & Pipe Wks. v. *Oconto Water Co.*, 183 U. S., 216; 22 Sup. Ct. Rep., 111, 118.

Pittsburg, etc., Ry. v. *Long Island, etc., Co.*, 172 U. S., 493, 507; 19 Sup. Rep., 238, 244.

Jacobs v. *Marks*, 182 U. S., 583, 587; 21 Sup. Rep., 865.

POINT IV.

THE FACT THAT THE FEDERAL QUESTION ARISES ON THE EVIDENCE IS NO OBJECTION TO THE JURISDICTION OF THIS COURT; AND THIS IS ESPECIALLY TRUE WHERE, AS HERE, THE JURY WAS PEREMPTORILY INSTRUCTED TO FIND AGAINST THE FEDERAL RIGHT, AND THE QUESTION PRESENTED IS AN ABSTRACT ONE OF LAW.

We are aware of the rule that this court will not consider the evidence for the purpose of determining the proven facts, where there is a conflict; but this rule has no application in such a case as this. In this case the court will look to the evidence for the purpose of determining whether, in point of law, the judgment against the federal right can stand.

If the rule were otherwise, litigants would often be deprived of their rights; for there is no way to prevent a trial judge from instructing a jury to find one way or another, and upon such an instruction the only way to determine whether there was error is by considering the evidence.

The rule governing in such cases has often been announced by this court.

In indicating the different ways in which a federal question could be specially set up in the case of *Tullock* v. *Mulvane*, 184 U. S., 497, 22 Sup. Ct. Rep., 373, 374, this court, speaking by Mr. Justice WHITE, says:

> "It is urged by the defendant in error that these contentions involve no federal question, and that if they do they were not sufficiently set up in the lower courts, and, therefore, this court has no jurisdiction to review them. We dispose at once of the contention that if the propositions involve federal questions they were not duly raised below, by referring to the statement which we have made of the case, whereby it appears that the contentions were raised below, by the pleadings, *by the objections to evidence*, and by the request for instructions, and, indeed, as so raised were expressly considered and directly passed upon by both the trial court and the Supreme Court of the State of Kansas, which latter fact, in and of itself, suffices to present the federal question, even if it had been otherwise ambiguously raised on the record, which is not the case."

This question was considered by this court in the case of *Lehnen* v. *Dickson*, 148 U. S., 71, 13 Sup. Ct. Rep., 481, 482, this court, there speaking by Mr. Justice BREWER, says:

> "It is true, if there be an agreed statement of facts submitted to the trial court, and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. (*Su-*

pervisors v. *Kennicott*, 103 U. S., 554.) Doubtless, also, cases may arise in which, without a formal special finding of facts there is presented a ruling of the court, *which is distinctly a ruling upon a matter of law*, and in no manner a determination of facts, or of inferences from facts, in which this court ought to, and will, review the ruling."

In the case of *City of St. Louis* v. *Western Union Telegraph Company*, 148 U. S., 92, 13 Sup. Ct. Rep., 485, this court had to consider an action by the City of St. Louis against the Telegraph Company for the amount of a license tax of $5 per pole which that city had by ordinance imposed upon said company. At the close of the evidence the city made a motion that the court enter judgment in its favor for the amount shown to be due. In holding that whether this motion should have been granted or not presented a question for review, the court, speaking by Mr. Justice BREWER, on page 487, saying:

"At the threshold of the case we are met with the objection that there are no special findings of fact, and that, therefore, our inquiry is limited to questions arising upon the pleadings, or upon rulings made by the court during the progress of the trial.
* * *

"It is enough to say that in this case there was, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff was entitled to judgment for the sum claimed, which instruction was refused and exception taken; and this, as was held in *Norris* v. *Jackson*, 9 Wallace, 125, presents a question of law for our consideration."

In *Lancaster* v. *Collins*, 115 U. S., 222, 225, 6 Sup. Ct. Rep., 33, 34, this court held that it would look at the evidence for the purpose of determining whether a motion for a judgment by one of the parties should have

been sustained. The court, speaking by Mr. Justice BLATCHFORD, saying:

> "This court cannot review the weight of evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."

In the case of *Martin* v. *Hunter's Lessees*, 1 Wheaton, 304, there was in controversy the title to a certain tract of land. The case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged that this court could not inquire into the title, but could only determine the correctness of the construction put upon the treaty by said court, and that the judgment of said court would not be reviewed here, unless it appeared that a construction had been put upon the treaty. This court denied this position, on pages 357, 358, saying:

> "If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words, as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what the title is, and whether it have a legal validity? *From the very necessity of the case there must be*

a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and, therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party in reference to the treaty equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires that the error upon which the Appellate Court is to decide shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. *The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court."*

In *Cunningham* v. *Ashley*, 14 How., 377, an action was brought to this court on writ of error to the Supreme Court of Arkansas, the defendants claimed the legal title to the property in controversy, while the complainant claimed that he had a paramount equitable title thereto. This court examined all of the facts in the case with relation to their bearing upon the title of the parties, and at page 389, said:

"The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties. Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void."

The decree of the Supreme Court of Arkansas was reversed.

Hyde v. *Booraem,* 16 Peters, 169, was an action for the possession of notes, which had been executed and deposited for delivery to the plaintiff on certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all of the evidence was sent up with the record. This court there called attention to the fact that it was without authority to review the rulings upon questions of fact, but it did consider the evidence, the reason therefor being given by Justice STORY, on page 176, in these words:

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all of the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is whether, in point of law, upon these facts, the judgment can be maintained."

The court then reviewed the facts, and concluded that the judgment of the court below was wrong, and reversed it.

In *Dower* v. *Richards,* 151 U. S., 658, Justice GRAY, in an exhaustive opinion, says:

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but the competency and legal effect of evidence as bearing upon a question of federal law, the decision may be reviewed by this court."

In the late case of *Pardee* v. *Aldridge, supra,* this court, considering a case in many respects similar to this one,

did consider the evidence; not for the purpose of reviewing any conclusions of the lower court on disputed questions of fact, for there were none, but, as said by Justice Story, *supra*, for the purpose of determining *"whether in point of law, upon these facts, the judgment can be maintained."*

In the case of *American Paper Bag Co.* v. *Van Nortwick*, 52 Fed., 752:

> "Upon the hearing in the court below, at the conclusion of plaintiff's case, no counter evidence being offered, defendants moved the court to strike out and exclude all evidence as not tending to sustain the issue on the part of the plaintiff. The court sustained the motion, to which ruling the defendant duly excepted." (P. 753.)

The Circuit Court of Appeals, in holding that it could review the evidence on page 753, says:

> "This ruling and exception authorize the review of the evidence so far as essential to the question whether the facts proven made a *prima facie* case, sufficient, in the absence of counter evidence, to justify a recovery by the plaintiff."
>
> *Goulding* v. *Hammond*, 54 Fed., 639.

The situation where defendant offers no evidence and where it does, but it raises no issue with that of the plaintiff, there is no conflict, are identical, and in each case the court will look at the evidence for the purpose indicated.

As it appears to us, as the Circuit determined that there was but a naked question of law presented, and this view was concurred in by the court from which this appeal is taken, the cause is before this court for the purpose of determining whether upon these undisputed facts the judgment can be sustained.

As is said by the Appellate Court of Indiana, in its decision of this case:

"An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale."

C. I. & L. Ry. v. *McGuire et al.* (p. 250).

POINT V.

THE APPEAL IS PROPERLY PERFECTED FROM THE APPELLATE COURT.

As the Supreme Court of Indiana refused the petition of plaintiff in error to transfer this cause to it for revision and reversal of the decision of the Appellate Court, this appeal is properly here on writ of error to the said Appellate Court.

Missouri, etc., v. *Elliott*, 184 U. S., 530; 46 L. Ed., 673.

Rothschild v. *Knight*, 184 U. S., 334; 46 L. Ed., 573.

POINT VI.

THE MORTGAGOR COMPANY WAS BY STATUTE AUTHORIZED TO ACQUIRE REAL ESTATE IN CERTAIN CASES, WITHOUT REFERENCE TO THE USE FOR WHICH THE PROPERTY WAS DESIGNED BY THE COMPANY.

By Section 2 of an act in force January 20, 1852, passed by the General Assembly of Indiana, it was provided:

"It may be lawful for said corporations, by the consent of the directors of the same, to receive as subscriptions for the capital stock of said companies, under such regulations and restrictions as their board of directors may prescribe, any lands, town lots, real estate, or other description of property as may be offered for that purpose; provided, however, that the

same shall be sold (except so much as may be necessary for the use of said roads or for the purposes aforesaid) within a reasonable time, and the proceeds applied for the construction of said roads or their appurtenances." (Burns' R. S. 1901, Sec. 5151.)

By the second clause of Section 13 of an act of the General Assembly of Indiana, in force May 6, 1853, it is provided that such corporations are authorized—

> "To receive, hold and take such voluntary grants and donations of real estate and other personal property as shall be made to it to aid in the construction, maintenance, and accommodation of such railroad; but the real estate thus received by voluntary grants shall be held and used for the purposes of such grants only."
>
> 1 R. S. 1852, p. 425. Burns' R. S. 1901, Sec. 5153.

By the third clause of the last mentioned section such corporations are authorized to take and hold such lands "as may be necessary for the construction and maintenance of its railroad stations, depots and other accommodations necessary to accomplish the objects for which the corporation is created. * * *"

The property here in question, whether acquired or used for railway purposes or not, is property which falls within the designations which the legislature thus authorized the company to acquire under certain circumstances.

Inasmuch as each party to this litigation claims title to the real estate here in controversy through the mortgagor company, neither is in a position to contend that it was not acquired under authority given it so to do, by existing law.

It seems to us that the case of *Taber* v. *The Cincinnati,*

etc., Ry., 15 Ind., 459, ought to foreclose any discussion of this question. There a mortgage had been given on certain lands and town lots, which were not used or suitable to be used for the purposes of the road. The mortgagor company defaulted in the payment of certain interest, and an action was brought to foreclose the mortgage. It was contended that the complaint was insufficient for several reasons. Among others it was urged that the corporation had no power to acquire this property for the reason that it was not needed or used for the purposes of the road, and therefore the mortgage was of no effect.

In speaking of this contention and disposing of it, the court, on pages 463, 464 and 465, says:

> "Neither the original charter nor the amendment thereto contained any clause, in direct terms, conferring the right to acquire, hold, mortgage and dispose of real estate. It is contended by counsel for defendants that the company had the power to acquire such real estate as was essential to the operation of the road, but no more. *The description of the real estate contained in the record negatives the idea that it was for that purpose alone.* * * *
>
> "Before the bonds in suit were issued, another statute took effect (1 R. S., 426), by which railroad companies, which were then or might thereafter be incorporated, were empowered to receive lands, etc., in subscription of stock. The second section is as follows (then is set out in full Section 2 of the Act of 1852 above set out). * * *
>
> "*It is assumed in argument by defendant's counsel, although the record does not show it, that the lands mortgaged were acquired in payment for stock.* (P. 464.)
>
> * * * * *
>
> "We do not think the company, until the statute of 1852 was in force, had the power, primarily, to acquire title to the lands described; nor to any lands, other than for the immediate purposes of the road.

We suppose the defendants all stand in such condition that they are estopped to deny that the company did acquire title; it must, then, have been under the law of 1852."

Here the defendants in error, claiming the title of the mortgagor company, stands in the same position as it would if this action were directly against it, and not the pretended successor to its interest herein.

In the case of *American Dock, etc., Co.* v. *Trustees, etc.*, 39 N. J. Eq., 409, it was held that one who, himself, claimed under a grant from the state could not contend, in disputing the title of another, also under a like grant, that the state was without power to make the grant.

It is a principle to well settled for controversy that a mortgagor cannot deny its title to the mortgaged property, or its power to execute the mortgage.

American Water Works Co. v. *Farmers Loan etc., Co.*, 73 Fed., 956; 20 C. C. A., 133.

Vallejo Land Co. v. *Viera*, 48 Cal., 572.

Fisher v. *Milmine*, 94 Ill., 328.

First Natl. Bank v. *Ashmead*, 33 Fla., 416; 14 South., 886.

Burhans v. *Vanness*, 10 N. J. L., 102.

Boisclair v. *Jones*, 36 Ga., 499.

French v. *Blanchard*, 16 Ind., 143.

O'Hara v. *Shidler*, 26 Ind., 278.

Ryder v. *Sission*, 7 R. I., 341.

Hursey v. *Turbett*, 27 Pa. St., 418.

Stewart v. *Anderson*, 10 Ala., 504.

Myers v. *Snyder*, 96 Ia., 107; 64 N. W., 771.

Carson v. *Cochran*, 52 Minn., 67; 53 N. W., 1130.

So, too, the purchaser at an execution sale against a mortgagor is estopped to deny the title of the mortgagor or the validity of the mortgage.

In the case of *Wright* v. *Tichenor*, 104 Ind., 185, 188, it was held that a purchaser at an execution sale, could not deny the title of a part owner of such property, who was not affected by such sale, where the source of the title of such owner and the execution debtor was the same.

We take it to be established that the defendants in error are not in a position to deny that the mortgagor company lawfully acquired the real estate here in controversy. We also believe that they are not in a position to deny the validity of the mortgage, as against any property of the mortgagor, which it, in fact, covers.

In fact, the Appellate Court of Indiana, in its opinion in this case, held:

> "The property in question *was properly acquired* by the Louisville, New Albany & Chicago Railway Company." (Rec., p. 250.)

POINT VII.

THE MORTGAGOR COMPANY WAS AUTHORIZED BY EXPRESS ENACTMENT TO MORTGAGE THIS, AND ALL OF ITS PROPERTY, WHETHER USED FOR RAILWAY PURPOSES OR NOT, AND WHETHER OWNED AT THE DATE OF THE MORTGAGE OR AFTERWARDS ACQUIRED.

By Section 5212, Burns R. S. 1901, which became a law March 3, 1865 (Acts, 1865, p. 66), it is provided:

> "Said corporation shall have power to make and issue bonds bearing such rates of interest not exceeding seven per cent. per annum, payable at such times and places, and in such amount or amounts, as it may deem expedient; and to sell and dispose

> of said bonds at such prices and in such manner as it may deem proper, to secure the payment of any bonds which it may make, issue or assume, to pay by mortgage or mortgages, or deed or deeds of trust, of its railroad, or any part thereof, *and its real and personal property*, and franchises; and to act as a corporation. *All property of said corporation included in said mortgage* or mortgages, or deed or deeds of trust, *whether then held or thereafter acquired, shall be subject to the operation and lien* of such mortgage or mortgages, or deed or deeds of trust; *and in case of sale under the same, it shall pass to and become vested in the purchaser or purchasers thereof*, so as to enable them to form a corporation in the manner herein prescribed, and to vest in such corporation all the faculties, powers, authorities, immunities and franchises conferred by this act."

These provisions of the statute entered into and became a part of the three mortgages upon which plaintiff in error relies, and must be read with the descriptions of the property therein recited.

These statutory provisions divide the property the company is authorized to mortgage into two classes:

1. The *railroad*, which would include all property appertaining to the road, or used in connection therewith. It would include all appurtenances.

2. *Any of its other property*, real and personal.

Thus it is clear that there is an intention that the corporation may mortgage any property which it may acquire. The two classes mentioned in the statute are so comprehensive as to include all property of any nature which the company may acquire.

To this power to mortgage all of the different classes of the property of the corporation, is added a third power. That is to mortgage the said property "whether then held or thereafter acquired." The general power to mortgage

all property might have been limited by construction to mean that only then owned property should be mortgaged, but to avoid this result, the power to include after acquired property is explicitly given.

In the case of *Whitehead* v. *Vineyard*, 50 Mo., 30, that court, considering a statute much like ours, held that it was the clear intention of the legislature to include "all *other* after acquired property."

In the case of *Wilson* v. *Boyce*, 92 U. S., 325, 23 L. E4., 608, this court had to consider the extent of a lien which was made to cover the "road and property" of a railway company. There the State of Missouri had issued its bonds in aid of a certain road. There were two separate issues. In the act authorizing the first issue it was provided that they should be a lien on the "road and every part and section thereof, and its appurtenances."

In the second act, and upon the second issue, it was provided that the bonds "shall constitute a first lien and mortgage upon the *road and property* of the several companies," etc. Subsequent to the receipt of the bonds the company executed a deed of trust upon lands received by Act of Congress in aid of the road. The plaintiff claimed under this deed. On default the State of Missouri sold the property of the road, pursuant to power given in the above mentioned acts, and the defendant became the purchaser at such sale. The particular lands in dispute are thus described by this court:

> "*The lands in question do not constitute the road or any part thereof. The track of the road is not laid upon them, nor are they used in connection with the road.* The terms of the second mortgage are broader; and if the defendant's construction of its terms are correct, it is not necessary to decide whether the lands in question would pass under the expression 'appurtenances.'"

The court then discusses the sufficiency of the description, a subject to which we will hereafter have occasion to refer, and then, continuing, has this to say with reference to the scope of this authority:

> "In the first mortgage the state took its security upon the road and its appurtenances. In the second it authorized and obtained security not only upon the road of the company and every part thereof, but also upon its property, meaning its property and all of its other property. It is difficult to conceive any reason for this extension of language in the statute, except an intended extension of security."

It is thus held that this language in the statute was sufficient to include all property of the company, without reference to the uses or needs of the road.

It is clear that if the words "road and property" include power to mortgage all other property the words of our statute authorizing the mortgage to include "its railroad * * * and its real and personal property * * *," even with greater clearness gives such authority.

POINT VIII.

THE POINT URGED AGAINST THE TITLE OF THE PLAINTIFF IN ERROR AND WHICH HAS BEEN SUSTAINED BY THE CIRCUIT AND APPELLATE COURT, IS, THAT THE PROPERTY IS NOT INCLUDED IN THE DESCRIPTIONS IN EITHER OF THE MORTGAGES FORECLOSED, AND, THEREFORE, IT WAS NOT VESTED IN THE PLAINTIFF IN ERROR BY THE DECREE, SALE AND SUBSEQUENT DEEDS.

The learned judge of the federal court evidently thought that the description was sufficient to cover all of the property owned by the mortgagor, as the deed of the special master described all of it as being conveyed, and this deed was approved by the court.

The words of the mortgage of 1890 follow the words of our statute almost to the letter. In the conclusion of this mortgage it is said that it is the intention thereby to mortgage "all railroads, real and personal property * * * which the said railway company now owns, or at any time hereafter may own * * * *." The words of the statute are that the mortgage may cover "its railroad, or any part thereof, and its real and personal property. * * * All property of said corporation included in said mortgage, * * * whether then held or thereafter acquired shall be subject to the lien and operation of such mortgage * * *." Evidently the one who drew this mortgage had before him this statute, and intended to include therein the words of the legislature which gave authority to make it.

Considered in the light of this mortgage, and the proceedings had with reference to it, the question, as it seems to us, is not one of intention, but whether the words employed are sufficient to extend its binding force to the latitude intended.

The fact that the statute provides for a lien on all of the property, and specifically follows the lien through its different stages, finally lodging title in the purchaser at sale on decree, shows that the legislature intended to leave no room for doubt, nor to have its intent, in carrying full faith to such securities thwarted by any construction which the absence of these words would permit.

Without reference to the specific statutory authority concerning such mortgages, it has been uniformly held by the courts of Indiana, that a general description of property in a mortgage is all that is necessary. In the case of *Leslie* v. *Merrick*, 99 Ind., 180, a mortgage was given, which attempted to describe two different tracts of land.

As to the description of one of the tracts the Supreme Court, on pages 183-4, says:

> "This description of the sixty-one acres is obviously insufficient. But following it there occurs in the mortgage the following description of all the real estate mortgaged, and evidently intended to cure the imperfections in the previous descriptions: 'That *it is intended to mortgage all the land of John and Jane McKnight* except a * * * conveyed to Goodlet Morgan.' *A deed or mortgage of all the real estate of the grantor or mortgagor is good without any further description, because the real estate conveyed or mortgaged can be ascertained by evidence aliunde.*"

In *Barnes* v. *Bartlett*, 47 Ind., 99, 101, a grantor made a deed in which he described the property intended to be conveyed as "all right, title and interest, claim and demand, in and to all the estate, real and personal, * * * which it is or may be our right, to us, or either of us, to have, hold or receive as heir at law of Thomas Barnes."

This description was held to be sufficient to cover and convey all property inherited from such decedent.

In *Symmes* v. *Brown*, 13 Ind., 318, a deed describing real estate in a general, but in an indefinite way, but containing a general statement that grantors convey "all right, title, interest and claim in law or equity," by inheritance from a named decedent was held to be good.

In the case of *Woods* v. *Polhemus*, 8 Ind., 60, the deed described the real estate as "all their right, title and interest in the estate of Thomas Wood, deceased, wherever situate," was held to be good.

In *English* v. *Roche*, 6 Ind., 62, the court says: "The description is sufficient whenever the land intended to be mortgaged can be ascertained by it."

Referring particularly to railroad mortgages, we again

mention the case of *Wilson* v. *Boyce*, 23 U. S. L. Ed., 608 (2 Otto, 320).

There two mortgages were given by the Cairo and Fulton Railroad Company to the State of Missouri. The first mortgage covered the road and its "appurtenances"; just as does the clause upon which the court has based its decision in this case, cover only the road and its appurtenances of the New Albany Company.

The second mortgage covered the "road and property" of the company. The tract in controversy was a part of 11,896 acres of land which the company had owned. The plaintiff claimed title by deed from the company before foreclosure; the defendant claimed title through the foreclosure of the above mortgage and a sale of the property under such foreclosure.

In deciding the above case the court says:

> "The mortgage lien secured by the state by the act of 1855, when the first series of bonds was issued by the state, was expressed to be upon 'the road, every part and section thereof, and its appurtenances.' The lands in question do not constitute the road, or any part thereof. The track of the road is not laid upon them, nor are they used in connection with the road. The terms of the second mortgage are broader; and, if the defendant's construction of its terms are correct, it is not necessary to decide whether the lands in question would pass under the expression, 'appurtenances.'
>
> * * * These lands were the property of the company when held by it when this statutory mortgage took effect. The question is, does the word 'property' in the statute create a valid lien on these lands?
>
> The generality of its language forms no objection to the validity of the mortgage. A deed of 'all my estate' is sufficient. So a deed 'of all my lands wherever situated' is good to pass title. *Johnson* v. *De*

Lancy, 4 Cow., 427; *Pond* v. *Bery*, 10 Paige, 140. A mortgage 'of all my property,' like the one we are considering, is sufficient.

In the first mortgage the state took its security upon the road and its appurtenances. In its second mortgage, it authorized and obtained security not only upon the road of the company and every part thereof, but also upon its property, meaning its other property. It is difficult to conceive any reason for this extension of language in the statute except an intended extension of security."

"Such was the construction given to this language by the Supreme Court of the State of Missouri, in *Whitehead* v. *Vineyard*, 50 Mo., 30. The court there held that these words were intended to cover all the corporate property of the railroad company, including lands situated like those in controversy. It is said, however, that the language of the court referred to was obiter merely, and that the point before us did not actually arise in that case. This is an error. The action in that case was ejectment for land purchased by Thomas Allen, in a foreclosure proceeding of a statutory mortgage upon the lands of the Iron Mountain Railroad Company, under the statute of 1857, now before us. If the word 'property' did not cover the outside lands of the company, the plaintiff could not recover. But he did recover, the court saying that the intention of the legislature to include them was unequivocal; that there was not the shadow of a doubt upon the question. The point we are considering was the precise point before the court."

It was held that the mortgage lien attached, and the one claiming under it had title.

The mortgage there before the court is much like the one executed in 1890, now before this court. In the latter mortgage in the granting clause it is provided that it covered all the "railway system and property" in the future to be acquired; also in the concluding clause of the description, where it is described as "all railroads, real

and personal property" then owned, or thereafter acquired.

The distinction observed in the two mortgages executed to the state, and before the Supreme Court, illustrates the distinction between the other clauses in the mortgages in the case at bar, and those quoted by the Appellate Court, and considered by it in concluding that other property was not covered by these.

In the case of *Alabama* v. *Montague*, 117 U. S., 602, 6 Sup. Rep., 907, this court had to consider a mortgage which contained an "other property" clause. But there it was found in connection with the specific description, and neither in the granting clause or the conclusion. The court holds that it is clear that it was *not the intention* to cover and include all other property, but concedes the principle for which we are contending. On pages 912-913 it is said:

> "These words, which are found neither in the beginning of the granting clause as a general phrase to be afterwards emphasized by a more minute description, nor at the end, as a summary of what had preceded them, have their appropriate use in the place where they are found. * * *
>
> *It is not to be denied that in a writing descriptive of property to be transferred or assigned, the more general words, which include all that is intended to be conveyed, are not to be frittered away by an attempt at a description of each particular thing fairly included in the more general language.* But in such case it must be apparent that the intent was to include all that could be embraced within the more general terms. *If, for instance, the description of the property mortgaged had commenced by saying 'all the property of the grantor, real, personal and mixed, in the States of Alabama, Georgia, Mississippi and Tennessee, and had then attempted to enumerate this property, but have omitted some of it,*

this omitted part would have passed, as in *Spindle* v. *Shreve,* 111 U. S., 544."

The words of the mortgages before the court in this case are even more sweeping than those suggested by this learned court as being sufficient.

Here the description is not only contained in the granting clause, but also in the conclusion where the intent of the parties is expressly recorded. The words upon which the decision of the Indiana court is based are culled from the body of the specific description of the different properties owned by the mortgagor. The court in the case last cited holds that even if the specific description is not sufficient to include all of the property of the corporation, if it is clear from the granting clause, and, as it is in this case, also expressly declared to be the intent in the conclusion, "the more general words, which include all that is intended to be conveyed, are not to be frittered away by an attempt at a description of each particular thing."

In that case the court limited the words "other property" to mean property of a like character, for the sole reason that it was a part of the specific description, and not a part of the general declaration of intention in the granting clause.

This court also places itself on record with the proposition that even if the particular description does not include all property, if the declaration of intent does, it will supply any omissions which would result from adopting the specific description.

Applying this to the case at bar, where, especially in the mortgage of 1890, it clearly appears that it was the intention to embrace all property, and such intent is declared in so many words, even if the words relating to after-acquired property contained in the specific descrip-

tion do not cover this property, these words are not to be adopted to the exclusion of the other, but the general words supply any omissions in the particular description, and give the security the latitude intended by the parties.

In the case of *Cooper* v. *Wolfe*, 15 Oh. St., 523, the mortgage and the statutory power were much like those in the case at bar. The property there in controversy was some old railroad iron, such as broken wheels, rails, ties and other scrap and refuse iron which had ceased to be of any value for any purposes except for sale.

On page 530, the court says:

> "Counsel for the plaintiffs contend that whenever an article is detached, and its place supplied by a new article, the old becomes liable to execution, because, they say, it has ceased to be a part of the thing mortgaged. * * * And such might be the law of these mortgages, were they—as in the case cited from New York by counsel—(25 Barb. S. C. R., 284), *mortgages upon the 'railroad' eo nomine, and upon its real estate merely*. But such is not the character of the mortgages in question. They pledge, not only the road and real estate, but also the 'engines, tenders, cars, tools, materials, machinery, *and all other personal property*,' and the laws under which they are made authorize the company thus to pledge, not only the road and real estate, but also their 'equipment, franchises, income and resources,' and make such mortgages a lien upon *all the 'personal property'* of the company. The language of the laws authorizing the mortgages, as well as that employed in them, is very broad and comprehensive, and we have no doubt was intended, and has the legal effect to include the description of property specified in the charge of the court."

It is thus held that where the statutory power to mortgage includes a power to mortgage "all other personal property," and the power is exercised in the language of

the statute, the mortgage lien attaches and continues without reference to the use in which the property is employed.

In the case of *Central Trust Company* v. *Kneeland*, 138 U. S., 414, 34 L. Ed., 1014, 1015, the court, in speaking of the limit to which after acquired property clauses may go, says:

> "The first mortgage had the 'after acquired property' clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, *but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage.*"

Short, in his excellent work on Railway Bonds, in speaking of general descriptions in railway mortgages, Section 197, says:

> *"The entire property will pass by an appropriate generic description in the mortgage."* * * * "The general rule is, that, as already stated, the fact of present ownership sufficiently identifies the property to admit of its being conveyed by the most general words, if such appears to be the intent of the grantor. *Whether the property is necessary to the enjoyment of the franchises is entirely beside the question. The duty of the court is confined to ascertaining the true construction of the instrument without regard to any extraneous considerations. Thus, where the granting clause covers 'all and singular the lands, etc., rights and interests, real estate, etc.,' all the lands belonging to the company will pass without regard to the purpose for which they may be used.*"

In the case of *Robinson* v. *Railway*, 66 Pa. St., 160, the exact question which we are here considering was before the court. In deciding it, among other things, the court says:

> "The property being owned by the company at

the time of the execution of the mortgage, it clearly passed under the terms, 'all and singular, the estate and property, real, personal and mixed,' of the company, and the words, 'together with all and singular the lands, etc., rights and interests, real estate, etc., of and belonging to said party of the first part, of every kind, nature and character in either the states of New York, Pennsylvania and Ohio.' *The company having power to mortgage all its property, real and personal, and the instrument having embraced everything of a real and personal nature, it becomes immaterial whether the property in question was necessary to the use or enjoyment of the railroad or not.*"

In *Seigfried* v. *Peoples Bank*, 2 Tenn. Ch., 17, the description in the trust deed was, "All lands, tenements, etc., of every nature and description belonging to" the grantor bank, was held sufficient to pass all the bank's realty.

The chancellor, in speaking of the description, said:

> "Such a description has already been held good in wills. * * * In *McGovorock* v. *Deery*, Cold., 265, the conveyance in a deed of trust to the creditors of the grantors the 'undivided interest in the real estate of his father, wherever situate,' was held good. A deed of all her, the grantor's, lands and tenements, was held by Chancellor Wilhelm to carry the grantor's interest to any real estate to which she was then entitled. *Pound* v. *Barr*, 10 Paige, 146, and a deed conveying 'all my estate,' or all the estate of which a third person died seized, is equally effective."

To the same effect are:

Tranum v. *Wilkinson*, 81 Ala., 408; 1 South., 201.

Jackson v. *DeLancey*, 11 Johns., 365; 7 Dec., 403.

Frink v. *Branch*, 16 Conn., 260.

Strouse v. *Cohen*, 113 N. C., 349; 18 S. E., 323.

Thomson v. *Madison Assn.*, 103 Ind., 279.

Brown v. *Maury*, 85 Tenn., 358; 3 S. W., 175.

Starling v. *Blair*, 7 Kentucky (4 Bibb.), 288.

Westmoreland v. *Carson*, 76 Tex., 619; 13 S. W., 559.

Bank v. *Barrow*, 21 La. Ann., 396.

Eggleston v. *Watson*, 53 Miss., 339.

Beach on Railways, Section 616, in speaking of descriptions in such mortgages, says:

> "*The question as to what property is covered by a mortgage is entirely one of construction, dependent upon the authority under which the mortgage was made, and the intention of the parties as gathered from the language used, the same rules being applicable as control the construction of deed made by individuals.* It is evident that, when the mortgaged property is specifically described, there can be but little room for controversy; for a description or enumeration of certain things, real or personal, as subject to the mortgage, is exclusive of all others. But when such general terms as 'all other property,' 'the undertaking,' and 'appurtenances,' have been employed, there has been no little litigation over the intention of the parties. *A mortoage of railway property is to be construed in connection with the statute by which its execution is authorized, and when the statute confers upon the company the power to mortgage the whole, a deed couched in general terms will be deemed to create a lien upon all of the corporate property, unless a contrary intention appear in the instrument itself;* and, on the other hand, mere general words of description are not to be construed as extending the lien beyond the subject-matter as defined by the enabling act. The franchise of being a corporation is not included in a mortgage of the property and franchise of a railroad, unless by positive provision of law."

In the case of *Brady* v. *Johnson,* 26 Atl. Rep., 49 (Md.), a canal company gave a mortgage to the State of Maryland on "all and singular the lands and tenements now owned, or that may hereafter be acquired, by the said company, and all interest that said company now has or may hereafter have in or to any lands and tenements, estates and securities."

Speaking of this mortgage, the court, on page 51, says:

> "It thus appears that by these statutes and the mortgages, executed as thereby required, all property, of every kind and description, then owned, or that might be thereafter acquired, by the company, was, and still is, pledged and bound for the debts due the state."

Continuing, on page 52, the court says:

> "* * * It is now well settled that a mortgage with the 'after-acquired property' clause in it, embraces and creates a charge upon all property subsequently acquired by the corporation mortgagor, which comes within the description in the mortgage, and this is not only as to property to which the mortgagor acquires the legal title, but also as to that to which it only acquires an equitable title."

It was there held that two tracts of land thereafter acquired were covered by it.

In the case of *Williamson* v. *Railway,* 36 N. J., 398, it was held:

That a corporation was authorized to execute a mortgage covering all real and personal property then held, or thereafter acquired.

After the execution of the mortgage then before the court the mortgagor company acquired control of the capital stock of another company. It was held that this stock was subject to the lien of the mortgage, the court, among other things, saying:

> "The mortgagor had the right and possessed the power to acquire the stock in question. * * * The mortgaging of personal property thereafter to be acquired was the legitimate exercise of the power to mortgage personal property."

Under a Louisiana statute authorizing, as does the Indiana statute above quoted, a railway company to mortgage its present and prospective property, the court held in *Bell* v. *Ry. Company*, 34 La. Ann., 785, that the mortgage attaches to property as effectually as if it had been described specifically in the act, it being entitled to the same effect as if it had been a judicial mortgage."

In *Parker* v. *Railway Company*, 33 Fed. Rep., 696, the court approved this construction of the Louisiana act, and the power it vested in the company, and continuing said:

> "Obviously, it would be difficult, if not impracticable, for a railway company to specifically describe future property that may be acquired by grant or otherwise, and the generality of the language used in the mortgage act should not be fatal objection to the legal efficacy of the act relied on by complainants."

If this authority to mortgage other "real or personal property," "whether then held or thereafter acquired," is to be given effect, the contention that after-acquired property not acquired for railway purposes, cannot be mortgaged by generic description, cannot prevail. It is needless to urge that it would be utterly impossible to describe such future acquired property in any other way. Just where it may be along a line of railway, and just what it may consist of cannot be known when the mortgage is given. These mortgages secure bonds running for a long time. The court knows, as a matter of history, that these securities run from twenty to fifty years, and therefore

with this class, less than any other, could a requirement of a more specific description be complied with. From the very fact that the legislature conferred the power to mortgage property thus to be acquired, it follows that it was intended that the power should be exercised in the manner which human agencies permit. To hold that a specific description of this "other property" is essential to the validity of such a mortgage, is, in effect, a denial of the power to mortgage.

It is clear that if this property was held when the mortgages, or either of them, were executed, it is sufficiently covered by the clause referring to "then owned" property. How much more reasonable is it to hold such a description to be sufficient with reference to after-acquired property. Property then owned may be specifically described, for its identification is known. But in the very nature of things this cannot be true of property to be acquired. As the power to mortgage any property thereafter acquired, whether used for railway purposes or not, must be conceded, it must follow, that if this power is exercised with the same degree of certainty as is required with property, the identification of which is known, it is sufficiently exercised.

POINT IX.

THE LEARNED COURT OF INDIANA DID NOT CONSIDER ALL OF THE PROVISIONS OF THE MORTGAGE, BUT ONLY A SINGLE PARAGRAPH WHICH IS FOUND IN THE SPECIFIC DESCRIPTION OF PROPERTY, AND WHICH IS NOT AS BROAD AS THE DECLARATION OF INTENTION AT THE BEGINNING AND CONCLUSION OF EACH MORTGAGE. THEN, TOO, EVERY AUTHORITY CITED BY THE COURT IN SUPPORT OF ITS OPINION IS BASED UPON A MORTGAGE WHICH, BY ITS EXPRESS TERMS, OR BY THE STATUTE AUTHORIZING IT, LIMITED THE LIEN TO PROPERTY ACQUIRED FOR RAILWAY PURPOSES.

The learned Judge, speaking for the Appellate Court of Indiana, says:

> "In the mortgage of 1886 the description of after acquired property is as follows: 'Which may at any time hereafter during the continuance of this trust be acquired by said railroad company for purposes connected with or appertaining to the railroads or railways above mentioned.'
>
> "The description of after acquired property in the mortgage executed in 1890 was in the following words: 'And all that it may in the future add, construct or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described.'
>
> "The description of after acquired property in the mortgage executed in 1894 was in the following words: 'What may at any time before or after the date of this indenture be acquired by or for the railway company for purposes connected with or appertaining to said railroad or railways hereby conveyed." (Rec., p. 251.)

In our statement of the record we have shown the introductory and concluding provisions of the descriptions

of property intended to be covered thereby. The general declaration at the beginning of the description in the mortgage of 1890 says in so many words that it shall cover "all of the personal and in the future to be acquired railway system and property * * * of every kind and nature, and however owned." Then follows a long statement of the items mortgaged. It is in the body of this attempted specific description that is found the above clause with reference to future acquired property considered by the learned Judge of the Appellate Court. At the conclusion of this description it is said in so many words: "It being intended and hereby expressly covenanted, that the lien of this indenture shall embrace and bind all railroads, real and personal property * * * which the said railway company now owns, or at any time hereafter may own, as fully, etc. * * *"

In the case of *New Orleans, etc.*, v. *Parker*, 143 U. S., 42; 12 Sup. Rep., 364, cited by the Appellate Court, the act under which the mortgagor company was incorporated, and giving it power to execute mortgages, restricted the lien of such mortgages to real and personal estate *"appurtenant to or necessary for the operation of said main line of railroad."* And the mortgage then before the court provided that it should cover *"all other property*, real and personal, of every kind and description whatsoever, and wherever situated in the State of Louisiana, which is now owned, or which shall be hereafter acquired, by said company, and which shall be *appurtenant to, or necessary to be used for the operation of said main line of railroad, or any of its branches."*

The court, on page 367, in construing the mortgage and power, says:

> "The language of the act of the legislature and the mortgage itself restricts its lien to real and per-

> sonal property situated in the State of Louisiana, then owned or which should be thereafter acquired, and which should be appurtenant to, or necessary or used for the operation of the main line of said road or any of its branches. * * * No argument is needed to show that a land grant is not necessary to aid in the construction of the road, but it is certainly not necessary in its operation. Plaintiff's contention, then, if supportable at all, must be upon the theory that the land grant was appurtenant to the road; not necessary to its operation, but to the road itself."

In that case the lands in controversy were lands granted by congress in aid of the construction of the road. It was held, and properly so, that these lands, after acquired, did not pass, under the after-acquired clause of the mortgage, because they were not appurtenant, and the company was not authorized by its charter to mortgage any but "appurtenant" lands; and in the particular mortgage, before the court, had not attempted to do so.

In the case of *Humphreys* v. *McKissick*, 140 U. S., 304; 11 Sup. Rep., 779, cited by the Appellate Court, there was in controversy some elevator stock which the Wabash Company acquired after the execution of the mortgage in an elevator beyond the terminus of its road. The only clause in the mortgage which it was claimed included the stock, is in the words *"and other appurtenances thereunto belonging."*

On page 782, the court says:

> "From the views expressed we are of the opinion that the stock held by the Wabash in the Union Elevator Company at Council Bluffs was not covered by the mortgage executed on February 15, 1879, such stock not being in any sense an appurtenant to the property covered by the mortgage."

The mortgage in the case of *Railroad* v. *Coffin,* 50 Conn., 150, provided that its lien should extend to lands *"acquired by the company for the purposes of the railroad."* In holding that this clause did not extend to disconnected lands, not adopted to the uses of the company, the court, among other things, said:

> "Lands purchased and sold at a profit, although the profit might be expended in the construction of the road, were never intended to be embraced by the phrase, 'acquired by the company for the purposes of the road.'"

In the case of *Walsh* v. *Barton,* 24 Oh. St., 28, the lands in question were not used for the purpose of the road, nor adopted for such use. The mortgage provided that it should cover "all property, real and personal, of said party of the first part, whether now owned or hereafter acquired, *used or appropriated for the operating or maintaining the said road."*

On page 43, the court says:

> "The testimony shows that the railroad was not located on the lands embraced in the purchase of the defendant below, nor were the lots purchased by him ever used for railroad purposes. The question, then, is this: Was the entire tract of land embraced in the mortgages? We think not. The words 'used or appropriated for the operating or maintaining the said road,' restrict the operation of the mortgages to such property, real or personal, of the company, as then was, or thereafter might be used or appropriated for operating the road."

In the case of *Mississippi, etc., Co.* v. *Chicago, etc., Co.,* 58 Miss., 896, a railroad mortgage covering property thereafter to be acquired was confined to such as was appurtenant to or necessary for building or operating the road, and carrying out the purposes for which it was created, and was held not to include an hotel and brick

storehouse, some vacant town lots and a farm of 300 acres; the hotel being used as a railroad eating house, and the other property being rented out for the several purposes for which it was adopted.

There was no statute authorizing the company to acquire the property in controversy; and there was no statutory power to mortgage "other property" thereafter acquired. A statutory authority to mortgage property owned at the time of the execution of the mortgage, is extended by implication to include power to mortgage after-acquired property, acquired for railway purposes; but not property not acquired for such purpose.

As our statute expressly authorizes all after-acquired property to be mortgaged, this case is not an authority here.

In the case of *Dismore* v. *Racine, etc., R. Co.,* 12 Wis., 725, cited by the Appellate Court, it was held that a mortgage by a railroad company of its road and appurtenances, and of lands after acquired for its stations, shops and the like uses, does not create any lien upon a tract of woodland afterwards acquired, situate several miles from its road. This decision is placed upon the distinct ground that the words of the mortgage were not broad enough to cover the property in controversy. In course of the opinion the court says:

> "The lands and real estate spoken of in the mortgage, were those upon which the road was to be constructed, or in which the company might acquire the right of way, or lots or parcels of land along the line of the road, used or to be used for erecting thereon depots, engine houses, shops, and all such structures as might be necessary for the business and operation of the road; or upon which drains and embankments

might be made for the protection and preservation of the same."

In the case of *Farmers Loan and Trust Co.* v. *Bank*, 11 Wis., 207, it was held that a mortgage by a railway upon its stock, materials and every kind of personal property, did not profess to cover chairs acquired by the company which were never used in connection with its business.

In that case the mortgage covered the "railroad, with its superstructure, track and all other appurtenances made or to be made," and also the "railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, *and every other kind of personal property which shall be* USED FOR OPERATING *said railroad.*"

In *Shirley* v. *Waco Ry. Co.*, 78 Tex., 131; 10 S. W., 543, the mortgage covered "all and singular the charter rights, privileges and franchises" granted by the legislature, "and all other rights and appurtenances."

It was there held that lands donated by the state were not *appurtenances*, and did not pass on foreclosure.

In *Eldridge* v. *Smith*, 34 Vt., 484, the mortgage lien by the express terms of the instrument was limited to the "railroad and franchise, and also all station house, engine houses, etc., and other appendages with *all the lands thereto belonging and intended for the use and accommodation of said road.*"

In the case of *Shamokin Valley* v. *Livermore*, 47 Pa. St., 465, the lien of the mortgage was limited to the entire road with its "corporate privileges and appurtenances."

The lands in question were not appurtenances, and the mortgage did not even purport to include them.

The Appellate Court quotes as authority supporting its conclusion the last clause of a paragraph found in the work of Mr. Short on the law of railway bonds and mortgages, Section 209. The part quoted conveys the idea that the lien of railway mortgages as to after-acquired property, is limited to such as is acquired for railway purposes. But considering the entire paragraph, it appears that the author there refers to mortgages where there were restrictive words limiting the lien to such property.

The entire paragraph from which this clause is taken by the court is as follows:

> "Similarly, where the general words of the description are qualified by such phrases as 'that may be included in the location of said railroad,' 'used as a part of said railroad,' 'appurtenant thereto,' 'necessary for the construction, operation or security thereof,' 'necessary for the completion and operation of the road'—the lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will not embrace lands situated outside the lay-out of the road, which had been taken over by the company in order to acquire at a less cost the lands actually needed for the lien itself."

From the very fact that the author places his conclusion upon the *limiting words* of such mortgages, it is clear that he intends to recognize the right to mortgage all property by the use of *proper words*.

This leaves yet unconsidered the case of *Seymour* v. *Railway*, 25 Barb., 284. In that case the words of the mortgage, with reference to after-acquired property, were general. But the charter limited the right of the corporation to acquire real estate, and the court held that the after-acquired clause should only extend to such property

as the corporation was by its charter authorized to acquire.

On page 311 the court says:

> "But the equitable rights of the plaintiffs only extend to the particular land designated by statute, and which the company was authorized to take, and did take, for the use of its road."

On page 307, in speaking of the proper construction of the mortgage, the court says:

> "The description in the mortgage, of the land acquired, and to be acquired, must be deemed to refer to the charter, and the law defines the land which the mortgage is destined to cover, and the lien of the mortgage clearly attached to such unacquired land so soon as the title thereto passed to the corporation."

Continuing, on page 311 the court says:

> "But the equitable rights of the plaintiffs only extend to the particular lands designated by statute. * * * The railroad company, in addition to the right to lay out its road not exceeding the width of six rods * * * was entitled * * * 'to purchase, hold and use all such real estate, and other property as may be necessary * * * to accomplish the objects of its incorporation.' * * * , all such lands, with the erections thereon, would pass to the complainants, under their mortgage, as part of the railroad, or as essential to its use and enjoyment.
>
> But lands acquired by the railroad company, and not thus used or employed for railroad purposes, would not come within the description of the mortgage.
>
> The particular lands which were to be acquired after the mortgage was put on record in the several counties through which the railroad passed, within the rule above stated, must necessarily be the lands designated by the statute for the railroad, and such as the company was authorized to acquire and take

for its track and legitimate use, as above stated. These are embraced within the purview of the mortgage and nothing more."

While the court seems to regard this authority as in point, yet it appears that it was because of the limit of the power to mortgage after-acquired property and the power to acquire real estate, that it was held that only such property as was acquired for railway purposes was within the purview of the mortgages.

That this is not an authority in Indiana, we believe is established by the case of *Taber* v. *Railway*, 15 Ind., 459, to which we have already referred at length.

It is interesting to note that counsel for the appellant in the case last cited, cited the case of *Seymour* v. *Railway, supra*, as an authority supporting their contention.

Here, as there, it was not shown why this property was acquired, nor how it was acquired. Whether it was received in payment for stock as a donation or for what purpose. It is clear, however, that the company was authorized to receive this property, and that all of the parties to this action are in a position where they are affirming its title, and, therefore, are estopped to deny the authority of the corporation to acquire and hold it.

Then, it is to be remembered that where a corporation has power to do a thing upon the existence of certain conditions, the validity of its act will be presumed and the one who asserts its invalidity has the burden of showing the non-existence of such conditions.

Railway v. *Mahoney*, 148 Ind., 196, 203.
Russell v. *Railway*, 157 Ind., 305, 315.
Smith v. *Board*, 6 Ind. App., 153, 165.

We believe we have made it clear that neither of the mortgages in controversy in the cases which the Appellate Court cites in support of its opinion are similar to those upon which appellant's title is based, and that in each case it was held that only railway property was covered because of the *words of limitation* in the respective mortgages, or in the charter powers of the corporation.

POINT X.

TITLE WAS SUFFICIENTLY SHOWN BY PROOF OF A VALID ORDER OF SALE AND A DEED.

Indianapolis, etc., v. *Center Tp.*, 143 Ind., 63, 69.

Wollen v. *Rockafeller*, 81 Ind., 208.

POINT XI.

THE COURT ERRED IN REFUSING TO ADMIT OFFERED EVIDENCE, WHICH WOULD HAVE SHOWN THAT THE PROPERTY WAS ACQUIRED BEFORE THE DATE OF EITHER MORTGAGE, AND, THEREFORE, THE LIEN ATTACHED UNDER THE CLAUSE COVERING ALL PROPERTY "THEN OWNED."

All that we have thus far said is upon the assumption that the power to mortgage property after acquired is just as broad as that to mortgage property owned at the date of the mortgage, and that when a mortgage is executed from which it appears that there is a clear intention that the lien shall attach to all future acquired property, the reason for acquiring the property is of no consequence.

If we are in error as to this; if, perchance, there is

some virtue in such a mortgage on property then owned, which does not attend one which is aimed at after acquired property, then the Circuit Court erred in refusing to admit evidence offered for the purpose of showing that the railway company owned this property at the date of each of these mortgages. The statute gives the power, and this court in the case of *Wilson* v. *Boyce*, and the Supreme Court of Indiana, in the case of *Leslie* v. *Merrick*, *supra*, have affirmed the proposition that a description of "all property" owned by the mortgagor at the date of the mortgage was a sufficient one. Many of the cases to which we have referred sustain this position.

If this be true, and there was legitimate evidence offered for the purpose of showing that this property was acquired much earlier, due effect was denied the decree by a refusal to admit the evidence.

The Plat Excluded.

The appellant offered in evidence a certified copy of a plat of the town of Francesville, upon which the ground here in question was indicated as being "depot grounds."

The party who signed this plat, above his signature, among other things put the following: "The depot being built immediately on the section line, divided said section line." This plat is dated March 3, 1862, and recorded April 8, 1862. (Pp. 12a and 38a.)

Counsel objected to the introduction of the plat for three reasons:

1. That it had not been shown that the man who signed this plat was the owner of the property included in it.

2. That it was void because it named no grantee with reference to the tract designated as depot grounds.

3. Because it contained no description of the property. (Rec., 39.)

Answering these objections in their order:

It was not necessary for the plaintiff to show that the person who platted these lands was in fact the owner thereof at the time such plat was made.

This objection is fully met by Section 4238a, R. S., 1901, which is an act by the general assembly of Indiana, legalizing all plats of additions to cities and towns and of subdivisions of sections. This section, if it is valid for any purpose, is sufficient to overcome the objection of counsel that it was not shown that the owner of this property had signed the plat.

This section reads as follows:

> "That all plats of additions to cities and towns and of subdivisions of sections which have heretofore been recorded in the recorder's office of any county without the owner or owners thereof having signed the same, or without having the execution thereof acknowledged and certified as required by law, but under which lands or lots have been sold or conveyed, or where such additions or subdivisions have been entered upon the tax duplicate for the purposes of taxation in accordance with the descriptions contained in such plats, are hereby legalized and declared valid to all intents and purposes from the date of the recording of such plats, to the same extent as if the same had been duly signed and the execution thereof had been duly acknowledged and certified before they were recorded."

Another plat of the town which was admitted in evidence, and admitted to be correct, shows this ground as platted at the present time in identically the same way as it was platted by Allison, and thus shows that the Allison

plat is the one which is recorded as the true plat of the Town of Francesville. This plat is found in the record, page 240a. This property has also been entered on the tax duplicate by the description in this plat. (Pp. 158 to 163.) All of the descriptions in appellee's proceedings and deed are based upon this plat. (Pp. 196 to 209.)

It is important to note that the act legalizing this plat was in force before the lien of appellee McGuire attached to any property of the New Albany Company. But even if this were not the case, he would not be in a position to deny the validity of this act.

As for the description being void, we think that there is no force in this objection. All of the different streets are indicated, the location of the railway is indicated, and there would be no trouble whatever in locating this tract of ground with the monuments thus established. This plat was valid, and sufficient to transfer the legal title to the property in question to the railway company then owning the line of track indicated on the plat.

We also think the grantee was sufficiently indicated on the plat.

In the case of *Morgan* v. *The Chicago & Alton* (U. S.), 24 L. Ed., 743, the Supreme Court had to consider a plat in this respect similar to this one. There the owner of the real estate had conveyed one hundred feet to the railway for a right of way. He afterwards platted the ground on each side of the railway track and left a strip 200 feet in width and 1,004 feet long, and on the plat marked it "depot ground." No railway was named, and it was afterwards contended that the extra fifty feet on each side of the center of the track thus attempted

to be dedicated was not dedicated, because the plat was indefinite, uncertain and void.

The Supreme Court, on pages 745 and 746, held against this contention, and in so doing said:

> "It is also insisted, in behalf of the appellee, that the premises in question were dedicated by the appellant to the railroad company. This question arises under the 21st section of Chapter 25 of the Revised Statutes of Illinois of 1845. The provisions of the statute are peculiar. It declares, touching town plats, that the plat or map, when executed and recorded as required, 'And every donation or grant to the public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted on such plat or map,' shall be deemed a sufficient conveyance of such parcels of land to vest a fee simple title, and shall be considered a general warranty against the donor and his heirs to the grantee, for his benefit, 'for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.' Four classes of parties are named who may be the recipients of the donation: (1) The public; (2) any individuals; (3) any religious societies; (4) any corporations or bodies politic. The purposes of the grant are not required to be set forth, nor is there any limitation as to what they shall be. The power and will of the donor are unfettered. The provisions are simply a mode of conveyance which the grantor may pursue, if he chooses to do so. The language of the statute is clear and explicit. There is no room for doubt. The case is one in which the rule applies, that there shall be no construction where there is nothing to construe. Dwarris Statutes, pp. 143, 144. There can be no doubt of the power of the legislature so to provide.
>
> Was the intention of the appellant to dedicate the premises to the railroad company for its use for depot purposes, as claimed, 'named, expressed or intended'? Either, as to the use, is, according to the statute, sufficient.

The facts to which we have adverted in the previous parts of this opinion seem to us conclusive upon the subject. The question must be resolved in the affirmative. If this view be correct, the legal title, by virtue of the statute, passed to the corporation with the right of user as to the premises for all depot purposes, but for none other.

No particular form of words is required to the validity of a dedication. The dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, that it was the intention of the proprietor to set apart certain grounds for the use of the public. An examination of the cases referred to on the argument will show that dedications have been established in every conceivable way by which the intention of the dedicator could be evinced. *Godfrey* v. *Alton*, 12 Ill., 29.

The question whether a person intends to make a dedication of ground to the public for a street or other purpose must be determined from his acts, and statements explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter. *Columbus* v. *Dahn*, 36 Ind., 330.

All that is required is the assent of the owner, and the use of the premises for the purposes intended by the appropriation. The law considers the owner's acts and declarations as in the nature of an estoppel *in pais* and precludes him from revoking the dedication. *Cincinnati* v. *White*, 6 Pet., 431; *Holdane* v. *Cold Spring*, 21 N. Y., 474."

This case is as nearly in point as one could well be. The words used in designating the ground on the map are the identical ones here employed, and here we have the additional fact in the indication of the depot, the water tank, and the wood-house, on this tract which we claim was dedicated to the company. True, the Illinois case from which we have quoted was based upon a statute with reference to dedicating property to private persons,

but this statute is substantially the same as the one in force in Indiana, and which was in force when this plat was made.

We refer to Section 4412, R. S., 1901, which reads as follows:

> "Every donation or grant to the public, or to any individual, religious society, corporation or body politic, noted as such on the plat of the town wherein such donation or grant may have been made, should be considerd a general warranty to the said donee or grantee for the purposes intended by the donor or grantor."

In the case decided by the United States courts the fact that the railroad company had been in possession, and such possession had been undisturbed for many years, was cited as an additional circumstance showing concurrence by the grantor. There is not the slightest indication that the owner ever protested against this occupancy, but it is shown that the adjoining lots were sold, buildings have been erected upon them, and this has at all times been recognized as railway property, which the grantor intended that it should be.

Every presumption is in favor of the decree of the United States court. Here all of the property of the mortgagor company was ordered to be sold, and a deed conveying all property of the mortgagor company was approved by the court, as a proper execution of its decree of sale. In view of this, the presumption is that such conditions as were necessary to exist in order for that court to order the sale of the whole proprety did exist, and the defendants in error, denying this, have the burden of proving that this is not true. If, as defendants here contend, if this property was after acquired it was not covered by the decree, it is for them

to show when it was acquired, and, failing in this, full effect will be given to the decree.

In *Knevals* v. *Railway*, 66 Fed. Rep., 229, the court had to consider this question. In deciding it the court says:

> "It has been established by both parties that the question as to whether these lots in question appertain to the railroad, and therefore pass by the sale, is the important one in this case. Our views do not coincide with those of the complainant that the burden of proof upon this point is upon the defendant to show that the property passed by the sale, but, the sale being proven, and being general, purporting to convey all the property, rights and franchises of the railroad, and possession having passed with the sale, and the property being now, and having been for years, in the control of the defendants, and a great part of each lot occupied for railroad purposes, we consider the burden to be upon the complainant to show that it came within some exception and did not pass."

The plaintiff in error offered to prove payment of town taxes by it on the property in controversy for the year 1891, and all subsequent years to 1898 by the mortgagor company; also a special assessment for a local improvement of $1,600. (Petrie Rec., 170 to 174.) This evidence was all excluded.

It was shown that one Brooks made a deed to the mortgagor company for the property here in dispute, in 1896. In that deed the original plat or dedication thereby of this property is confirmed. It was also shown that this property was listed for state and county taxes, by the descriptions given it in the excluded plat, and that from 1889 to 1898 the mortgagor was taxed of record therewith, and paid such taxes. (Pp. 157 to 169.)

It was also shown that the depot and stock pens were

constructed on this track before 1865, and that they have been maintained there ever since. (Pp. 174 and 178.) That in 1893 the mortgagor company leased a part of this property, and in 1897 the plaintiff in error leased a part of it. (Pp. 242 and 245.)

The plaintiff in error also offered the excluded plat, in connection with the Brooks deed, but it was again excluded. (P. 180.)

With the excluded evidence admitted, dedication and acceptance from the date of the plat would have been established. Indeed, with its continued possession, payment of taxes and assessments, and exercise of acts of ownership, the dedication in the plat would have the full force and effect of a deed of conveyance.

With this evidence, title at the date of each of the several mortgages would have been established, and with that, the mortgages would each have included the property, under the provision covering all of the property of the mortgagor owned at the date thereof.

POINT XII.

THE JUDGMENT OF THE CIRCUIT, APPELLATE AND SUPREME COURTS OF INDIANA DENYING THE TITLE OF PLAINTIFF IN ERROR TO THE REAL ESTATE IN CONTROVERSY, SHOULD BE IN ALL THINGS REVERSED.

Respectfully submitted.

E. C. FIELD,
G. W. KRETZINGER,
H. R. KURRIE,
Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 69.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

vs.

PATRICK McGUIRE AND OTHERS,
Defendants in Error.

Reply Brief of Plaintiff in Error.

We have carefully considered the two arguments of learned counsel for the defendants in error, and we yet believe that each of our several contentions ought to be sustained.

THERE IS JURISDICTION.

The case of *Howard* v. *Fleming*, 191 U. S., 137, cited by counsel, is not adverse to our contention. In that case there was a conviction for the violation of a local statute. The case took the usual course until there was an affirmance by the Supreme Court of the state. At no time in the proceedings had there been any suggestion that the appeal ought to succeed for the reason that any right of the accused, as given by any authority of law of the United States, had been denied. At no time had the at-

tention of the state courts been directed to a consideration of the contentions, with this in view. There it was properly held, that although the questions in the case were fully considered and decided, yet, as they had not been considered in the light of the alleged Federal Right, there was no jurisdiction.

In the case of *Beals* v. *Cone,* 188 U. S., 184, cited by counsel, it appears that at no time was the attention of the state court directed to any claim of title or right under the laws of the United States. In speaking in that case, the court, among other things, by Mr. Justice BREWER, says:

> "And in the opinion of the Supreme Court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the Constitution or laws of the United States. Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact, concerning the time, extent and effect of the alleged discoveries of minerals, and also alleged wrongs in respect to the jury. To those matters, and to those alone, was the attention of the parties and the courts directed."

In the cases of *Leigh* v. *Green,* 193 U. S., 79, and *Mallett* v. *North Carolina,* 181 U. S., 589, this court held, that where a Federal question was raised in a petition for a rehearing, and on such petition it was decided adversely to the one making the claim, it had jurisdiction to review such decision on writ of error. There is absolutely nothing in either of these decisions which supports the contention of counsel.

The case of *Gableman* v. *Peoria, etc.,* 179 U. S., 335, is not in point. Its entire inapplicability is shown by

this concise statement of the case and the conclusion, by Chief Justice FULLER:

> "The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of the court of chancery, and not under any provision of that constitution or those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of the opinion that this question must be answered in the negative * * *."

In the case of *Defiance, etc.*, v. *Defiance*, 191 U. S., 184, the plaintiff in error sought to invoke the jurisdiction of the courts of the United States, for the purpose of avoiding an anticipated adverse result in an action affecting its water rentals contract, with defendant in error, which was then pending in the courts of the state. When the litigation first arose in the state courts, on petition it was removed to the United States court; it was by that court remanded to the state court. At about the same time this action was begun in the United States court, for the purpose of accomplishing the same end, which the defendant there was then attempting to accomplish by defense in the action in the state court. There was no diverse citizenship, and this court held that as the case did not involve a right claimed under the Constitution or laws of the United States, it did not have jurisdiction. In the opinion, among other things, Chief Justice FULLER says:

> "Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular

> and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional."

It is also there held, that it is the right and duty of state courts to decide Federal questions, properly raised, and "the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."

In the case of *Home for Incurables* v. *New York*, 187 U. S., 155, this court held that it did not have jurisdiction on writ of error for the reason that "It is entirely consistent with the record that the home did not, at any time pending the case in the state court, set up or claim any such right." There it was claimed by the plaintiff in error that the state court "refused to recognize" the claim under the Constitution of the United States. But there was absolutely nothing anywhere in the proceedings calling attention to any such claim, and everything in the decision of the court was consistent with a want of any such claim. However, in this decision the court, speaking by Mr. Justice HARLAN, does use this language, which strongly supports our contention here:

> "In *Parmalee* v. *Lawrence*, 11 Wall., 36, 38, this court, following the previous cases of *Lawler* v. *Walker*, 14 How., 152, and *Mississippi & M. Co.* v. *Rock*, 4 Wall., 177, said it was essential to our jurisdiction in re-examining the judgment of the state court, that the alleged conflict between the law and the Constitution of the United States 'appear in the pleadings of the suit, *or from the evidence in the course of the trial*, in the instructions asked for, or from exceptions taken to the rulings of the court,' or it must be 'that such a question was necessarily involved in the decision, and that the state court would not have given judgment without deciding it.' Later

cases in this court have expressed the additional thought that *if the highest court of the state assumes that the record presents a question of Federal right, and decides against the party claiming such right, we will look no further and will proceed to the consideration of that question,* unless the decision is made to rest in part upon some ground of local law, sufficient enough, in itself, to sustain the judgment, independently of any question of Federal right."

In the case of *Johnson* v. *New York, etc.,* 187 U. S., 491, it was held that as the alleged Federal question or right had not been specially set up in any pleading, and as it was not decided, there was no jurisdiction.

In the case of *Mutual Life Co.* v. *McGrew,* 188 U. S., 291, it was held that a Federal question, first raised in a petition for a rehearing, was not presented in time to give this court jurisdiction on writ of error, where the petition for a rehearing was denied, without opinion by the state court.

It appears from the quotations given by counsel from the cases of *Bausman* v. *Dixon,* 173 U. S., 113; *Western Union, etc.,* v. *Ann Arbor, etc.,* 178 U. S., 239; *Gableman* v. *Peoria, etc.,* 179 U. S., 335, and *Pope* v. *Louisville, etc.,* 173 U. S., 573, that neither of these cases are in point on the question of jurisdiction.

The case of *Marrow* v. *Brinkley,* 129 U. S., 178, which counsel say is "exactly in point," is not in point at all. It appears from the statement of this case given by counsel, that there was a Federal question involved. But the court, in deciding the case, put its decision entirely upon non-federal grounds, and, therefore, there was no occasion for the intervention of this court. As is stated by counsel on page 8 of their second brief, in speaking of this case:

> "The decision of the state court in no way questioned the validity of that statute or any construction of it, but was based upon other grounds not involving a Federal question, namely, estoppel and laches, and the motion to dismiss was sustained."

In addition to the other decisions which we have heretofore cited, we call attention to the case of *Wedding* v. *Meyler,* 192 U. S., 573; that was an appeal from the Court of Appeals of Kentucky. The lower court had held invalid a judgment of an Indiana court holding that there was no jurisdiction. And, although no Federal right or question was by that name asserted, yet this court held that the decision necessarily involved such a question, and there was jurisdiction.

Wabash Ry. v. *Pearce,* 192 U. S., 179.

In speaking of the question in this case, counsel in their second brief, page 9, say:

> "The question is not of the authority, or verity, or credit of the decree, but what is the meaning of the words used * * *."

This is the Federal question. What is the meaning, the scope, the due effect of this decree? This court can review the decision for the purpose of determining whether its due effect has been denied.

> "Whether due effect has been given by a state court to a judgment of decree of a court of the United States is a Federal question within the jurisdiction of this court, on writ of error to the Supreme Court of the state."
>
> *Central Natl. Bank* v. *Stevens,* 169 U. S., 432, 460.
>
> *Crawford et al.* v. *Burke* (U. S. Sup.; decided Nov. 7, 1904).

It seems clear to us that this court does have jurisdiction to hear and determine this case. The purpose of the statute requiring a claim of title under the laws of the United States to be specially set up is not, primarily, to give this court jurisdiction, but to direct the attention of the state court to the fact that the claim is made under such law, or an authority under it. This is what is required, and all that is required. If the matter is brought to the attention of the court in such a way as that the court is advised that the title is claimed by reason of the laws of the United States, or an authority thereunder, and the court, with this in view, denies the title, there is jurisdiction.

Here is a case where it was necessary for the plaintiff in error to show its title to the property in dispute. Inasmuch as it appeared that title was claimed from the Louisville, New Albany & Chicago Company, by both parties, it was sufficient for plaintiff in error to show that the title of that company had passed to it, and not to the defendants in error. It attemps to show this by offering as its sole proof of that fact a decree entered in a court of the United States. Thus it is made to appear from the evidence that the sole claim is under this decree, and title is set up and claimed under it, and in no other way.

It is urged that something should have been said in the motion for a new trial, or the assignment of errors to show that the rights which we claimed were under the laws or authority of the United States. Counsel are well aware that the question of whether the verdict was right, or whether the peremptory instruction should have been given, were presented in the only way in which they could be under Indiana practice. If a motion for a new trial had contained such a specification alone, counsel

would have urged, and properly so, that no statutory cause for a new trial was assigned, and that the Appellate Court should refuse to consider the motion. If it had been stated in an assignment of error, and we had to stand or fall on that assignment, lawyers must agree that the Indiana court would have refused a decision, for the reason that the assignment presented no question for review.

Counsel have studiously avoided any attempt to show that there was any other way than the one adopted whereby this question could have been presented to the Circuit and Appellate Courts of Indiana for review. Indeed, it is so well settled that it can only be by motion for a new trial, assigning only the causes here assigned, and by assignment of error just as was here done, that it is idle to assume such learned counsel will deny it.

Bane v. *Keefer,* 152 Ind., 544.
City of Terre Haute v. *Fagan,* 21 Ind. App., 371.
Hedrick v. *Hall,* 155 Ind., 371.

This contention of counsel is amusing, when considered with their argument as to our second paragraph of amended complaint. There we did in detail give a history of our title, and claim that we had title by reason of the decree afterwards introduced in evidence, and the deed subsequent thereto. The court ordered this to be made more specific, and as we excepted to the ruling, declining to amend, the paragraph was no longer considered as a part of the case. This decision, denying our title thus set up, was also presented to the Appellate Court for review by proper exception, and assignment of error. The Appellate Court did not decide the question. It is now said that some local rule of practice was not

complied with in saving this ruling for review, and that, therefore, the Appellate Court was not called upon to pass upon its sufficiency. After all we find learned counsel contending that the questions must be saved and presented for review in such a way as that by the rules of practice in force in the particular state the court is called upon to decide the question.

This is true, in the very nature of things, when we remember that the purpose of setting up the question is to have the state court first decide it.

Here we did this. It was all we could do, and as the Appellate Court states that our sole claim of title is under a decree of the court of the United States, it is clear, beyond peradventure, that the court understood that our sole claim of title was under the laws of the United States, and authority thereunder exercised; that it regarded the presentation sufficient to call upon it to determine the scope and effect of the decree, and as a consequence our title by reason thereof, and, as it decided against our title, this court can determine whether its decision was right.

TITLE.

On page 6 of their brief counsel, citing authorities, say: "Under the law of the State of Indiana, proof of an equitable title will not support the averments of such a complaint," meaning our complaint, in which we assert a legal title. On page 10, speaking of the title which the evidence, in fact, showed, counsel say: "so that the plaintiff in error showed by this deed of 1896, from Brooks, *a legal title in* the property in controversy." This latter statement is correct, and it renders the first point, with authorities, a purely moot question.

It is said on page 9. as urged in our brief, that "Where title is claimed through a common grantor it is sufficient to trace it to that source."

Counsel in their brief, on page 10, say that each party to this litigation claims title through the Brooks deed, which was made in 1896. As far as the defendants in error are concerned, counsel rest their claim entirely upon the title which the Louisville, New Albany & Chicago Company received through this deed. The plaintiff in error claims whatever title the mortgagor company got by reason of the Brooks deed, and also claims by reason of the title which it received in 1862, the validity of which is recognized and confirmed in the Brooks deed. Of course, it would have been sufficient here for plaintiff in error to have simply shown the mortgages by and the decrees against the mortgagor company, and the subsequent deed of sale and the deed to plaintiff in error, together with the fact that defendants in error claimed title through the same company. However, the plaintiff went

one step farther than this and showed the Brooks deed conveying title to the railway company, and also a foreclosure proceeding conveying title to railway property and all other property of the Louisville, New Albany & Chicago Railroad Company to it. The Brooks deed recites on its face: "Said piece or parcel of land being the same platted and dedicated for depot grounds, and duly recorded April 8, 1862." (pp. 155, 156.)

The plaintiff in error claims under the Brooks deed, and also under the dedication recognized in the Brooks deed. The defendants in error put their whole claim on the Brooks deed, but they endeavor to deny the dedication which is fully recognized and confirmed in the deed through which they claim. Our claim of title under the plat and the deed are consistent with the recital in the Brooks deed. The claim of defendants in error under the deed alone must be consistent with the deed, for they cannot accept it in part and reject it in part.

This recital in this deed required the consideration of the plat referred to, in connection with the deed.

Watson v. *Boylston*, 5 Mass., 411.
Clough v. *Bowman*, 15 N. H., 504.
Hoyatt v. *Phifer*, 15 N. C., 273.

It is a rule of construction too well settled for controversy that where one instrument of title refers in some way to a prior one, in interpreting and construing the subsequent one, the prior is to be considered as a part of it.

In view of this statement in the Brooks deed, and of this principle, counsel's conclusion that there was no title except by possession prior to the Brooks deal is without merit.

THE MEANING OF THE MORTGAGES.

Counsel seem to be laboring under the impression that this court is to be governed by the reasoning which was brought to bear in the Indian court. That if our reasons for a reversal in that court were not as strong as they now are, the appeal ought to be denied. We understand that this court decides this case for itself. It learns the questions in issue, and for itself determines the law applicable thereto. All that occurred in the Indiana court here to be considered is sustained by the certificate of the clerk of that court. We do not find anything in the record supporting these statements of counsel.

Counsel contend that the concluding clause of the mortgage of 1890 could not enlarge the terms of the grant going before. They also quote on page 18 a paragraph which it is said is taken from the granting clause of the mortgage. In this statement counsel are in error. This is not taken from the granting clause at all, but from the body of the attempted specific description in this mortgage. The granting clause is found in our original brief at pages 4 and 5. It will be noted that this clause, after stating that the mortgage covers all property of every nature, wherever situate, concludes: "more particularly described as follows:" then follows an enumeration of the counties in which its railway is, also certain articles of its property, and following this, and in and as a part of this attempted specific description of the property to be mortgaged, is found the clause which counsel have selected, and which they state is a part of the granting

clause. If this was, in fact, a part of the granting clause, a different question might be presented. But it is not, and, as this court has held in a case already cited, that where the granting clause shows an intention to mortgage all property, there will be no reduction of security, even though, in the attempted specific description, some of it is omitted.

Here we have just such a case. The granting clause makes it absolutely clear that all property was covered thereby, whether then owned or thereafter acquired. The concluding clause also makes it clear that the parties intended to mortgage all, and they thereby expressly declared that if all had not been described in the attempted specific description, it was to be regarded as covered thereby the same as if it was specifically described.

This mortgage of 1890 contains a copy of the resolution of the board authorizing it to be made. In this resolution the officers are directed to pledge all railway property, then held or thereafter acquired as security, and in conclusion it is there recited that they may also mortgage "all and singular its property of every kind and nature, real, personal and mixed, now owned or at any time to be hereafter acquired, in possession or expectancy, including the corporate and other franchises of the company." (P. 73.)

While the *habendum* of a deed cannot operate as a grant, yet it may enlarge or diminish a grant, where it is so worded as to indicate a clear intention to do so.

Summer v. *Williams,* 8 Mass., 162; 5 Am. Dec., 83.

Edwards v. *Bell,* 75 Ind., 401.

It has been held that the *habendum* of a deed will control the granting clause where they are inconsistent.

Singleton v. *School Dist.*, 10 S. W., 793.
Baskett v. *Sellers*, 12 S. W., 9; 93 Ky., 2.
Barnett v. *Barnett*, 37 Pac., 1049; 104 Cal., 298.
Pynchon v. *Stearns*, 11 Met., 316.
Ball v. *Foreman*, 37 Oh. St., 141.
Doren v. *Gillum*, 136 Ind., 134.

However, this question does not seem to be very important here as both the granting clause and the *habendum* are consistent, and each of them shows a clear intention to mortgage the property here in controversy.

The case of *Galveston Railroad* v. *Cowdrey*, 11 Wal., 460, is much in point on the merits. There, the charter permitted the railway company "to acquire, by purchase, donation or in payment of stock, such real estate as the directors should think desirable to aid in the construction or maintenance of said road; and to alienate or mortgage the same for the constructing or maintaining said road. * * *" (Pp. 460-1.)

In speaking of the scope of this authority, the court, by Mr. Justice BRADLEY, on page 474, says:

> "It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way."

The extent of the lien on property after acquired is determined by power and intention.

Short on Ry. Bonds, etc., 189.

Compton v. *Jesup*, 68 Fed., 263, 286.

In Sec. 134, in his work on Railroal Securities (1st Ed.), after stating that the power to mortgage after acquired property "is held to be limited to such acquisitions as it then has the power by charter or by general law to make," Jones has this to say about the case of *Meyer* v. *Johnson*, 53 Ala., 237, cited by counsel:

> "Upon this ground it was held that a mortgage by the Alabama & Tennessee River Railroad Company did not cover a grant of lands subsequently made by the United States, which the company was by special act empowered to accept, because it had no power to accept such a grant when the mortgage was given, and the acquisition of such a land grant was not then contemplated. Although the mortgage in terms covered the road and the corporate franchises, together with 'all other property now owned and which may be hereafter owned by the railroad company,' its operation was restricted to such property as the company then had power to receive and hold."

The same author, Sec. 104, has this to say about the case of *Shamokin Valley R. R. Co.* v. *Livermore*, 47 Pa. St., 465, which counsel say "is squarely in point":

> "Under a mortgage of a road, 'with its corporate privileges and appurtenances,' only such property passes as is directly appurtenant to the road and is indispensably necessary to the enjoyment of its franchises. Therefore such a mortgage does not cover town lots adjoining the roadbed, without specific mention of the lots, although purchased by the company ostensibly for a basin to connect the road with river navigation, unless as a matter of fact such lots are essential to the enjoyment of the corporate franchises."

In the case of *Maxwell* v. *Wilmington, etc.*, 77 Fed., 938, cited by counsel, the court had to consider the question of whether the provisions of a mortgage were broad enough to cover any future acquired property. The court recognized the power to make such a mortgage, but in speaking of the one before it says:

> "There are no expressions, terms or language in the mortgage which, by the broadest interpretation, can be construed to apply to any other property than to that which was in existence and owned by the company on June 24, 1890."

In the case of *Morgan* v. *Donovan*, 58 Ala., 241, the charter of the company authorizes it to hold such real property, "as may be necessary and convenient, for the construction, maintenance and management of the railroad." The mortgage in controversy covered "the land occupied by said railroad, or hereafter acquired, owned or occupied, * * * including all depots, etc., now owned and occupied or hereafter acquired in connection with the said portion of said railroad, situated upon or lying within the limits of said city, or upon or adjacent to said portion of said railroad and the route and line thereof."

On page 256, in considering the mortgages, the court says:

> "We think the sole question necessary to be considered in this case is whether the mortgages embrace and convey the lots and wharves in controversy. If the terms of the granting clauses are broad and specific enough to include them, then we think there is no question that the title to the defendants is paramount to that of plaintiff. On the other hand, if the mortgages do not convey them, then the plaintiff has the superior title. We quote from the Act of Incorporation only as aid in enabling us to determine the true meaning and scope of the mortgage conveyances."

The court holds in the decision of the case that it was not the intention to mortgage any but property used in connection with the operation of the road or acquired for that purpose, as it was only such property that its charter permitted it to acquire.

From this reference to the authorities cited by counsel which have not heretofore been discussed, it appears that none of the decisions cited support the contention so far as it concerns the mortgage of 1890; or so far as each of them concerns all property owned at the date of the mortgages.

THE DECREE.

The description in the decree is not open to any objection. It appears that the court embodied in the decree the identical description which is found in the several mortgages, and ordered to be sold all property mortgaged or intended to be mortgaged. A description of "all property" in any case is sufficient. Evidently the court was of the opinion that this description was sufficient, for it approved a deed of sale conveying all of the property of the mortgagor company, wherever situated, to the purchasers at the foreclosure sale.

The principle announced in the case of *Bowen* v. *Wickersham*, 124 Ind., 404, cited by counsel is yet the law in Indiana, but it has no application here. The principle there announced refers to a case where there is reference to other instruments in a mortgage for a description of the property mortgaged. In that case the decree and other descriptions of the property contained a specific description of a tract, and provided that the decree affected all of the tract thus described "except such portions of the above described tract of land as have hereto-

fore been laid out in town lots by James Roach, and have been by him sold and conveyed prior to the execution of of the mortgage herein." There, in order to get any meaning from the description it would have been necessary to learn of the tracts thus platted and conveyed, and by excepting them the tract ordered sold would be determined. The court holds that under such circumstances the things which would be disclosed by this investigation must be averred in the complaint, and the property actually affected described therein, and in the decree. That the description in the decree must be complete, and could not be completed by reference to other instruments.

The test is thus stated by the court in the quotation set out by counsel:

> "The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the decree."

There is here no reference to any other instrument for a complete description, but the property is described as all of the property of the mortgagor. We have not yet been able to find a case where it has been held that such a description is indefinite.

Take it here. It is conceded by counsel that this description of all property used for the purposes of the railway company is sufficient as to it. That such property is thereby affected and correctly ordered sold. But to determine the property affected by such an order it is necessary to determine two things: First, is the property owned by the mortgagor corpany? Second, is the property employed in the purposes of the company, so as to be within this part of the decree? To determine the property affected by the general description of all prop-

erty, it is only necessary to determine whether it is owned by the company. The one conceded to be good contains two elements of uncertainty; the one contended to be bad contains but one, and that is one of the elements of doubt in the admitted one.

The practice of thus describing property in decrees on sale of railway property is so universal that the absence of one authority questioning its sufficiency is sufficient to justify the court in holding that it cannot be assailed.

In the case of *Kneavels* v. *Railway*, 66 Fed., 229, referred to at length in our original brief, p. 74, it was held that where a decree was general, as here, purporting to convey all property, the one who denied that a particular piece of property was not conveyed by it had the burden of establishing this fact.

In the case of *Kibbe* v. *Thompson*, Fed. Cas., 7754 (5 Biss., 226), it was held that where a decree did not describe property affected thereby, but merely referred to a place where a proper description could be found, it was a question of fact to be determined by the court or jury as to just what property passed by the decree.

Jones, in his work on mortgages, Sec. 1575, says:

> "The decree and order of sale may properly follow the terms of the mortgage, when this upon its face appears to convey the entire estate, and the officer must sell accordingly; but the purchaser will take only the interest the mortgagor had in the premises, and it is no ground for reversal that the mortgagor had only an equitable interest."
>
> *Pere Marquette Ry. Co.* v. *Graham* (Mich.), 99 N. W., 408.

In the case at bar it is clear that all of the parties to the foreclosure proceeding regarded this description as abundantly sufficient. The intention to mortgage all is clear. The intention to decree the sale of all, to sell and

convey all, is clear. The purchaser has a deed from the special master containing a description of all property, which as a description in a deed must be admitted to be sufficient. The purchaser took possession of all, and the plaintiff in error is shown to have been in possession of this property during the time of this controversy. Under these circumstances it is plain that the requirements of the law have been substantially met, and that the defendans in error are not in a position to make this collateral attack upon the decree.

The defendants in error, at page 12 of their second brief, set out a statement from the decree to the effect that the property covered by each mortgage is the same and identical. This statement is not to be confused with the statement from our brief set out at page 11 of the same brief. Ours refers to the scope of the provisions of the different mortgage; those of the decree to the property which was, in fact, covered thereby. The court does find that the property covered by each was and is the same and identical property. And we affirm that this is the fact. We endeavored to show it in the Indiana court, and it, holding that the recital of dedication did not commit the defendants in error to that proposition, and excluding the plat and other evidence, prevented us from showing that this property was owned at the date of each of the several mortgages, and was covered by each of them. This is the fact. The railway company has been in possession of this property since 1862, under the title given it by the dedication of that date. The deed of 1896 did not give it the title, but it does set at rest any of the technical objections which might be, and which defendants here are asserting against the sufficiency of this dedication. It was, indeed, a conveyance to set at

rest its entire title. In view of their attitude placing their whole claim on the deed of 1896, the defendants are committed to the proposition that there was a dedication, and that it was completed in 1862. This commits them to the proposition, as we believe, that this property was conveyed by each of the mortgages, extending to all then owned property. But if not, if the plat had been admitted, it, with the other evidence, would have shown title from this early date—a fact which, until now, has never been disputed.

This statement from the decree, and this position of counsel with reference to it, but emphasizes our contention that, by excluding this plat, the court refused us the right to show the true scope and effect of this decree, and thereby deprived it of its due effect, and we of our title which we would have but for this refusal.

THE PLAT EXCLUDED.

This brings us to the contention of counsel that the rejection of the plat, and the other rejected evidence, does not present a Federal question.

Earlier in their brief counsel have argued that the after acquired property clause did not include this property, because of its alleged limitations. It is also urged that as the title was derived by reason of the Brooks deed, it is apparent that the "then owned" clause of the several mortgages could not possibly reach it, for the reason that his deed dates subsequent to the date of either of the mortgages.

If the mortgage of 1890 is as broad as we claim, perhaps this question is not an important one. But if the court should hold that it only included property thereafter

acquired for the purposes of the road, then it becomes an important one. What more effective way could a state court adopt to defeat a title claimed, as is this one, than to exclude the evidence offered, for the purpose of showing title or the date at which the mortgagor acquired it? If the question of whether it vested by reason of the decree is to turn upon the date at which it is acquired, how can the right be more effectually denied than to exclude evidence offered for the purpose of showing that it was acquired in time to be covered by the mortgages and vested by the decree and sale?

But this is a Federal question. If there was error in refusing to permit the plaintiff in error to introduce this plat and the other excluded evidence, due effect was denied the decree for the reason that it would have thereby been made to appear that it did pass by reason of the decree, and its effect upon all property owned at the date of the mortgage.

The case of *Martin* v. *Hunter's Lessees,* 1 Wheaton, 304, referred to at length in our original brief at page 33, fully answers this contention of counsel.

As we have before shown, the dedication in 1862 is recognized in the Brooks deed of 1896. Of this deed counsel at page 10 of their brief say:

> "Both parties claim title from the same common source, to wit: James C. Brooks and wife."

And on the same page counsel say this in regard to this deed:

> "The deed from Brooks covers the ground thus occupied by the railroad and used, and also the ground in controversy. * * *"

It is clear that they base their whole claim of title on the Brooks deed, or rather, the interest which was thereby

transferred to our common grantor. We, too, by reason of the after acquired clause claim whatever title was thereby given, but we also claim title which was given by the dedication in 1862, which is recognized in this deed. Claiming as they do, in whole, or even in part, through this deed, defendants in error are not in a position to deny the truth of the fact of dedication recited in the Brooks deed. It is well established that one is bound by the statements and recitals in the muniments of title through which he claims.

In the case of *Carver* v. *Jackson*, 4 Peters 1, this court, speaking by Mr. Justice STORY, had to consider the fact of the non-production of a lease, or other proof thereof, than by a recital of a marriage settlement deed, under which the parties claimed. Speaking of this recital it is said:

> "We are of the opinion not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence, and superseded the necessity of introducing any other evidence to establish it.
>
> * * * It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies —privies in blood, privies in estate, and privies in law."

This question was considered and decided in the case of *Lessee of Kinsman* v. *Loomis et al.*, 11 Ohio, 475, 479. There speaking, the court says:

> "The recital in the deed from Swift and others to the trustees of the Erie Land Company, is next to be considered. The preamble sets forth: 'Whereas, the trustees of the Connecticut Land

> Company have, by separate deeds, dated on the ..... day of ....., 1798, reconveyed to the parties of the first part, respectively, all the right, title and interest in and to' certain lands, including the premises. Now, the plain effect of such a recital as this is to conclude the parties to that deed, and all who claim through them, from denying the existence of such conveyance as, in this deed, is averred to have been made. The estoppel upon them is as effectual as if it were from warranty."

In the case of *Smith* v. *Lock et al.*, 18 Mich., 56, it was held that where one conveyed to another property described as being bounded by a village street, he could not afterwards deny that it was so bounded, or that there was a street at such a place.

In the case of *White* v. *Smith*, 37 Mich., 290, it was held:

> "When premises conveyed are described as fronting a certain number of feet on a specified street, the grantor and all who claim under him are estopped from afterwards asserting that the street referred to did not extend in front of the premises." (Syllabus.)

In the case of *Pillsbury* v. *Alexander*, 40 Neb., 242; 58 N. W., 859, the court had to consider a plat which had been recorded, but in the execution of which none of the statutory requirements had been complied with. In speaking of its binding force the court says:

> "Their platting this addition, filing the plat in the recorder's office, and leaving the spaces for streets, and their sale and conveyance of part of the property in this addition, described as lots and blocks of the addition, estop Arnold and Abbott, and their heirs, grantees or assigns, from claiming any title whatever to any of the land laid out as streets in said addition; and such acts amounted to a common law dedication of the land platted as streets to the public."

In the case of *Cobb* v. *Oldfield*, 151 Ill., 540; 38 N. E., 142, the court considers this question, and, although holding that the principle did not there apply, says this:

> "We recognize the rule of law, so frequently applied in this court, that a party claiming under a deed cannot be permitted to deny any of the material recitals therein, however contrary to the truth. (*Byrne* v. *Moorehouse*, 22 Ill., 605; *Kruse* v. *Wilson*, 79 Ill., 239; *Rigg* v. *Cook*, 4 Gilman, 336; *Orthwein* v. *Thomas*, 127 Ill., 561, 21 N. E., 430.)"

Devlin on Deeds (2 Ed.), Secs., 992, 995, 997, 1000, 1027 and 1311a.

Hanly v. *Blackford*, 31 Ky., 1; 25 Am. Dec., 114.

Hart's Heirs v. *Johnson*, 6 Ohio, 87.

Fisk v. *Flores*, 43 Tex., 340.

Douglass v. *Scott*, 5 Ohio, 194.

Jackson v. *Parkhurst*, 9 Wend., 209.

Torrey v. *Bank*, 9 Paige, 649.

City of St. Louis v. *Wiggins Ferry*, 15 Mo. App., 227.

Robbins v. *McMillan*, 26 Miss., 434.

Pinckard v. *Milmine*, 76 Ill., 453.

Wiseman v. *Hutchinson*, 20 Ind., 40.

Croskey v. *Chapman*, 26 Ind., 333.

Brannon v. *May*, 42 Ind., 92.

Coleman v. *Watson*, 54 Ind., 65.

Hazlett v. *Sinclair*, 76 Ind., 488.

Chicago, etc., v. *McEwen*, 71 N. E., 926, 928 (Ind. App.).

Here is a statement in a deed through which the defendants in error claim, that this property was dedicated for depot purposes in 1862. Here is notice directly brought home to the parties, not only that this deed is not the sole source of title, but that the property was dedi-

cated in 1862. As against the defendants in error, and all claiming under this deed, the dedication thus recognized was made valid for all intents and purposes, and they, now claiming under this very deed, are not in a position to deny this dedication.

In the light of authorities cited, it seems that by the introduction of the deed, and the basis of claim upon it, the defendants in error are absolutely committed to the proposition that this property was dedicated in 1862. The dedication recognized ought to have been fully explained, and it was for this purpose that the plaintiff in error was entitled to have this plat, and the other excluded evidence, admitted.

But even with the evidence which did go to the jury, the deed admitting dedication, possession since 1862 and use for depot and railway purposes of much of this property during all of the time, payment of county taxes and leasing the property, not only shows title from the date of the plat, but any other claim by defendants in error is inconsistent with the statement of this deed through which they claim, and by the statement of which they are bound.

Respectfully submitted.

E. C. FIELD,
H. R. KURRIE,
G. W. KRETZINGER,
Counsel for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
FILED
SEP 14 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 836 69

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

v.

PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY,
Defendants in Error.

MOTION TO DISMISS OR AFFIRM.

Come now the defendants in error herein, by W. H. H. Miller, their counsel, appearing in that behalf, and move the court to dismiss the writ of error in the above entitled

cause for want of jurisdiction, because the judgment, for the reversal of which said writ of error has been sued out, is a judgment of the appellate court of the state of Indiana, being the court of last resort in said cause, and in the record and proceedings in said cause it appears that no federal question was involved, presented or decided in the state courts, as required by section 709 of the Revised Statutes of the United States.

And the said defendants in error, by counsel as aforesaid, also move the court to affirm said judgment, to reverse which said writ of error has been sued out, because it appears that no federal question has been presented, heard or decided in said cause, nor any decision been made in the state court of any question reviewable in this court, but it is manifest that said writ of error can result in delay only.

And the said defendants in error have caused to be printed, and file and present herewith a partial transcript of the record, showing all papers necessary to be considered in the determination of this motion.

And they also file herewith their printed brief in support of said motion.

W. H. H. MILLER,
Attorney for Defendants in Error.

FILE COPY.

original

FILED
SEP 14 19
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

No. 326 09.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,
v.
PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY, INDIANA,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

W. H. H. MILLER,
Attorney for Defendants in Error.

The Hollenbeck Press, Indianapolis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 336.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

v.

PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY, INDIANA,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

STATEMENT OF FACTS.

This was an action to quiet title to real estate described.

The complaint (Partial Tr., page 1) is the statutory one provided by the Indiana code.

R. S. 1901, section 1082.

The answer is a denial of plaintiff's complaint as to certain pieces of property here in dispute.

Partial Tr., pp. 3-5.

The action was brought in the Pulaski Circuit Court and taken by change of venue to the White Circuit Court.

There was a trial by jury on this complaint and answer and verdict for defendants.

(Partial Tr., pp. 5 and 6.)

The plaintiff filed a motion for a new trial, which is set out.

(Partial Tr., pp. 7 and 8.)

This motion was overruled, judgment rendered, appeal allowed and perfected, and assignment of errors filed in the supreme court of state.

(Partial Tr., pp. 9 and 10.)

The law as to hearing of appeals having been changed, the case was transferred to and decided and opinion filed by the appellate court.

(Partial Tr., pp. 10-15.)

Thereupon plaintiff in error filed its petition for a rehearing, every proposition of which is set out.

(Partial Tr., pp. 15-17.)

In this petition there was as to some propositions a little in the way of argument which we have omitted, though nothing therein suggests a federal question.

This petition having been overruled, plaintiff in error sought to have the action of the appellate court reviewed

by the supreme court of the state under subdivision 2 of section 1337j, R. S. 1901, the grounds of its petition being set out. This petition was denied.

(Partial Tr., p. 17.)

Thereupon this writ of error was sued out.

ARGUMENT.

It will be seen by an examination of the partial transcript above referred to that, from the commencement of the case until after the petition for a rehearing had been overruled in the appellate court, there is not a word in any paper directly or indirectly suggesting a federal question. For the first time in the record of the case, in the application to the supreme court to review the action of the appellate court, such a question is suggested. In Point 1 in said petition (Partial Tr., p. 17) we find the following:

"The appellate court held that it was shown without dispute that the property in controversy was not used for railway purposes; that it was after acquired, and on this account was not within the description in the mortgages upon which appellant's title is based. This was error. *The court thereby refused to give due effect to the judgment of the federal court.*"

This is simply a suggestion and is the only suggestion or utterance in any of the papers directly or indirectly making such a point.

Further along it will be shown that the making of such a point in this application for a transfer to the supreme court, after a final decision by the appellate court, was too late and wholly ineffective.

Not only does it thus appear that no federal question was made in the record, but no suggestion of any federal

question was made in the briefs of counsel for plaintiff in error on the original hearing in the appellate court, or on the petition for a rehearing in the same court.

In the brief on the original hearing counsel for the appellant there, plaintiff in error here, filed a printed brief of twenty-two pages, and from beginning to end in no way raised, attempted to raise or suggested that any question involving a right, claim or privilege under the constitution, statutes, treaties or authority of the United States, directly or indirectly, was involved in the case. They argued the questions and only the questions covered by the opinion of Judge Henley in deciding the case.

And so in the petition for a rehearing no such question was suggested. Prior to the filing of that petition the rules of the supreme and appellate courts had been changed so as to require that propositions of law upon which a party relied in the argument of a case should be distinctly and separately stated before the commencement of the argumentative part of the brief. Accordingly, in the brief filed on behalf of appellant (plaintiff in error), on the petition for a rehearing, counsel stated sixteen distinct propositions of law, the same being numbered from one to sixteen, inclusive, and cited authorities in support of the same. In not one of them is there a sentence or a word claiming that any federal question was involved or asking the decision of any such question. Nor was there in the argument in support of those propositions any such contention. The whole scope and contention of the argument was that the description in the mortgages under which plaintiff in error claimed title, including the after-acquired property clause, was sufficient to carry the title to plaintiff. There was no contention that the decree of the federal court was broader than, or was in language different from, the descriptions in the mortgages. Nor

was there any contention that, by failing to so hold, the court was denying to plaintiff any right, privilege or immunity to which it was entitled under the constitution, treaties, laws or authority of the United States. In short, there was not in the entire brief a suggestion of a federal question.

We have not deemed it necessary to set out these briefs in full, because we are sure that counsel for plaintiff in error will not claim that any such question is made therein, and certainly, if they do so claim, they will quote the passages upon which they rely as containing any such assertion of a federal right infringed or violated.

In order, however, that there may be no question about this, we do print the propositions of law, as stated by counsel for appellant in said original brief, as follows:

1. Page 2. "Both parties, therefore, claim title through the Louisville, New Albany and Chicago Railway Company, and the abstract question was presented to the court as one of law, as to whether the foreclosed mortgages carried the title to these depot premises in dispute, the appellant affirming that they were embraced within the mortgages and foreclosure, and the appellees contending that they were not, because the deed to appellant, of date February, 1896, was *after* the execution of the mortgages on which the foreclosure was had, and the same was *not covered* by the *after-acquired clauses* in such mortgages, and was not, therefore, embraced within the foreclosure and sale under the proceedings in the United States court.

"It, therefore, became an abstract legal question for the lower court to determine whether they passed by the foreclosure, and, concluding that they did not, the court instructed the jury to return a verdict for the defendant. This was manifest error in the trial court."

2. The second point presented was in the following words:

"It was sought by appellees' counsel on the trial to show, over the objections and exceptions of the appellant, that the land in question was used for *other than railroad purposes*. The error of court in this respect was assigned as a ground for a new trial."

3. The third point argued was that the trial court erred in excluding evidence offered by the appellant, plaintiff below, to prove facts tending to show that the property in question had been occupied so far as it was susceptible to occupation for railroad purposes; that the railroad company had paid taxes and special assessments for street improvements and had executed leases for elevators, store houses, lumber yards, etc.

4. And the fourth point argued was that a mortgage in general terms providing that the lien shall attach to after-acquired property is effective to create such a lien.

We set out also the propositions of law, sixteen in number, in the brief for appellant on petition for rehearing, as follows,—the authorities cited being omitted.

Propositions of Law.

I.

Since May 6, 1853, railway companies in Indiana have been authorized to hold real estate other than that which they used or needed for railway purposes.

II.

By the act of March 3, 1865, railway companies were authorized to issue bonds, and to secure the payment thereof, mortgage "its railroad, or any part thereof, and

its real and personal property * * * whether then held or thereafter acquired."

This act is still in force.

R. S. 1901, section 5212.

III.

The power to mortgage after-acquired property, without reference to the purpose for which it has been acquired, necessarily includes the power to describe it in the mortgage by general description. It is impossible to describe after-acquired property in any other way.

IV.

It must be conceded that "a deed or mortgage of all the real estate of the grantor or mortgagor is good without any further description, because the real estate conveyed or mortgaged can be ascertained by evidence *aliunde*."

V.

It has been repeatedly held, and it is the law, that railway mortgages may describe the property of the mortgagor as being its "road and other property," and that such general description showing an intent not only to mortgage all railway, but all property, will extend the mortgage to all property of the company whether used for railway purposes or not.

VI.

In this case, as it clearly appears that the mortgages upon which appellant bases its claim of title cover all of the railway and other property of the mortgagor, whether then held or afterward acquired, and as the statute expressly authorizes after-acquired property to be mortgaged, it must follow that an exercise of this power to mortgage after-acquired property by the same description as is sufficient to include property owned when the mortgage is given, is sufficient.

VII.

The provisions of statutes with reference to mortgages on purely local and private property do not apply to mortgages on railway property.

VIII.

In such cases if the description of the property in the mortgage is valid, and the decree by proper words refers to this description, even though the description in the decree is insufficient, standing alone, the decree is valid.

IX.

The second paragraph of the complaint shows adverse possession from the year 1862 continuously until the date that this action was brought. This possession has been maintained by the appellant and its grantors, immediate and remote. The reference in this paragraph to a plat made by one Allison is mere surplusage, or, at the most,

is for the purpose of showing color of title, and is unnecessary. The court erred in requiring appellant to make this paragraph more specific by stating the interest which the one who made the plat had in the property at the time it was made.

Color of title is unnecessary in cases of adverse possession, where all property claimed has been actually occupied.

X.

There was evidence from which the jury might have inferred that appellant and its grantors had been in adverse possession of this property for more than thirty years. The court erred in directing the jury to find for the defendants, as the mortgage would have attached by virtue of the "then owned" property clause, if the jury had found such possession to exist.

XI.

The offered evidence by which it was intended to show adverse possession since 1862 was excluded because plaintiff had alleged a title in fee simple and could not prove a title by adverse possession.

The title by adverse possession is as much a title in fee as one by direct conveyance from the owner, and it was error to exclude the evidence.

XII.

The plat which was offered in evidence was improperly excluded. The indication of the donee by the use of the words "depot grounds," the location of buildings and a

then existing railway, with evidence of continued use without interruption from the grantor, would have been a sufficient designation of the grant intended.

XIII.

It was unnecessary to show that this plat was in fact signed by the then owner of the land. All such plats have been legalized and given effect as of the date of the record thereof, to the same extent as if they had been signed by the owner before recording.

R. S. 1901, section 4238a.

XIV.

It is admitted by all parties that James C. Brooks and wife, who made a deed in 1896, were the sole heirs of James Brooks, who owned this property when the plat was made. This deed recognizes the existence of the plat, and it is to be construed with it as of the date of the plat in order to make certain the descriptions and donations intended by it.

R. S. 1901, section 4415.

XV.

Even if these statutes did not exist, and there was no proof that the one who made the plat was the owner of the property at that time, yet with evidence of the fact that the donee had occupied the tract designated on the plat, without objection from the true owner, it was sufficient to warrant the jury in finding a dedication and acceptance.

XVI.

As the mortgages upon which appellant's title is based covered *all property*, whether then owned or thereafter acquired, without reference to the use to which it was being put or was adapted, the fact that the property was not used or adapted for railway purposes could not affect the rights of the mortgagee or appellant, and the court erred in admitting evidence to the effect that this property was not used for railway purposes.

By rule 22 of the supreme and appellate courts of Indiana it is expressly provided that " no alleged error or point not contained in this statement or points shall be raised afterward either by reply brief or in oral or printed argument or on petition for rehearing."

II.

That the mere mention of this question, in the petition for the transfer of the case to the supreme court, is insufficient to invoke the jurisdiction of this court, for the decision of the federal question so suggested is entirely clear.

While it is not so expressly denominated in the statute (paragraph 2 of 1337j, R. S. 1901), yet in practical effect that statute is a provision authorizing the supreme court by writ of *certiorari* to review the decision of the appellate court in a special case, where it shall be of opinion that the decision of the appellate court contravenes a ruling precedent of the supreme court or that a new question of law is directly involved and was decided erroneously.

In the case at bar the supreme court found nothing of the kind, refused to take jurisdiction to rehear the case and denied the application. So that the judgment of the appellate court stands, and this fact has been recognized by the plaintiff in error in that they have sued out their writ of error from this court directed to the appellate court.

It, therefore, is too clear for argument that, as no federal question was presented in the appellate court or in the trial court, it can not be presented here.

III.

But had the same language been used in the brief or record in the appellate court that was used in the application for the transfer to the supreme court it would have been insufficient.

This case is one of the class where the federal title, privilege or immunity must be specially set up and claimed. And it is not sufficient in a case of this kind barely to suggest the violation of a federal right.

Oxley Stove Co. v. *Butler County*, 166 U. S. 648;

Columbia Water Power Co. v. *Columbia Electric, etc.*, 172 U. S. 475;

Home for Incurables v. *City of New York*, 187 U. S. 155;

Layton v. *Missouri*, 187 U. S. 356;

Jacobi v. *Alabama*, 187 U. S. 133.

In the Layton case, *supra*, it is expressly held that where the highest court of the state declines to pass upon a federal question because the same was not submitted

to the trial court, this court will not consider such question.

Even if the federal question had been suggested and argued in the appellate court, that court would not have been bound to decide the same, and would not have decided the same, unless it were within the necessary purview of the pleadings, and had been distinctly brought to the attention of the trial court in the motion for a new trial or otherwise, and it must affirmatively appear that the question was presented to the trial court. Elliott Appellate Procedure, section 470, and cases cited; *Coleman v. Dobbins*, 8 Ind. 156. And nothing is better settled in Indiana practice than that neither the appellate court nor the supreme court will decide any question upon petition for a rehearing which was not raised and clearly presented upon the original hearing.

See Elliott's Appellate Procedure, section 557, and the multitude of cases there cited.

Much more, then, in a case where, as in the case at bar, there was not in the trial court nor in the appellate court, which affirmed the judgment of the trial court, a suggestion of any such question, either in any paper which constitutes a part of the record, or even in the briefs of counsel, and where the opinion of the appellate court shows that no such question was considered or decided, it seems idle to contend that the bare suggestion of such a question for the first time in an application to have the supreme court review the action of the appellate court as upon *certiorari* should be sufficient to bring the question here.

In conclusion it is submitted, without imputation of an improper purpose on the part of counsel for plaintiff in error, that the only possible effect of suing out this

writ of error is delay. The writ ought, therefore, to be dismissed, or, if not, the judgment should be at once affirmed.

W. H. H. MILLER,
Attorney for Defendant in Error.

Indianapolis, September 7, 1903.

FILE COPY.

FILED
NOV 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 69.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

PATRICK McGUIRE, M. M. HATHAWAY AND PHILLIP DELAHOOD, SHERIFF OF PULASKI COUNTY, INDIANA, DEFENDANTS IN ERROR.

In Error to the Appellate Court of the State of Indiana.

BRIEF OF DEFENDANTS IN ERROR.

M. WINFIELD,
W. H. H. MILLER,
Attorneys for Defendants in Error.

The Bollenbach Press, Indianapolis.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 69.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

PATRICK J. MCGUIRE, M. M. HATHAWAY AND PHILLIP DELLINGER, SHERIFF OF PULASKI COUNTY, INDIANA, DEFENDANTS IN ERROR.

In Error to the Appellate Court of the State of Indiana.

BRIEF OF DEFENDANTS IN ERROR.

But two questions are presented by the record in this case:

First. Was the federal question so presented in the

state courts of Indiana as to confer jurisdiction upon this court?

Second. Did the decree of foreclosure, in the Circuit Court of the United States for Indiana, embrace the property in controversy?

These two questions we will discuss in their order. We refer to the motion on file to dismiss, for want of jurisdiction, and the partial transcript and brief thereon.

I.

No federal question is referred to in any of the proceedings had in the White Circuit Court of Indiana. The record shows simply the empanneling of the jury, the hearing of the evidence, and the instructions by the court to render a verdict for defendants in error.

Printed Record, pp. 31-32.

The causes for a new trial on pages 33 and 34 of printed record are the ordinary statutory causes. First, error in directing a verdict for the defendant; second, error in striking out the second paragraph of amended complaint; third, error in ordering the plaintiff to make his second paragraph of complaint more specific; fourth, because the verdict is contrary to the evidence; fifth, because it is contrary to law; sixth, because the verdict is not supported by sufficient evidence; seventh, because the court erred in refusing to allow the plaintiff to read in evidence the town plat of the town of Francesville; eighth, ninth and tenth causes relate to the action of the court in permitting the defendants to read in evidence the papers and proceedings had in a suit against the Louisville, New Albany & Chicago Railway Company, by McGuire, wherein he recovered damages, and upon which judgment and execution were issued and the

property sold and bid in by the defendant, Hathaway; eleventh and twelfth causes relate to the testimony of Hathaway, as to the condition of the property, its use and occupation for twenty years before; thirteenth, it is assigned for error that the court refused to allow proof that the railroad had paid taxes to the town of Francesville, on the lands in controversy, for street improvements.

It will thus be seen that up to this time no intimation was made in the Circuit Court of Indiana that the plaintiff in error relied upon a federal question. The errors assigned in the Appellate Court of Indiana are (Transcript, p. 248):

1st. The sustaining of appellees' motion for a new trial as of right.

2d. The court erred in directing the jury to return a verdict in favor of appellees.

3d. The court erred in ordering the appellant to make its second paragraph of amended complaint more specific.

4th. The court erred in striking out the second paragraph of amended complaint.

5th. The court erred in overruling appellant's motion for a new trial.

The opinion rendered in this case by the Appellate Court of Indiana is reported in 31 Ind. App. 110.

Thus there is no intimation in the Appellate Court of Indiana, in the assignment of errors, that the plaintiff in error relied upon a federal question. Page 253 of the printed record shows the filing of the petition and briefs for rehearing and that the same were overruled. The first intimation that the plaintiff in error relied upon a federal question is found in the petition to the Appellate Court of Indiana, for a writ of error, after the petition for a rehearing had been overruled, which petition for a

writ of error commences on page 253 of the printed record.

The only case cited by plaintiff in error, which seems to support the plaintiff's contention, that this court has jurisdiction, is the case of *Pardee* v. *Aldridge*, 189 U. S., p. 429. This court held it had jurisdiction, without giving any reason. An examination of the record in that case discloses that both in the *nisi prius* court and in the Supreme Court of Texas the plaintiff in error gave notice that it relied upon a federal question and raised the federal question in the *nisi prius* court by a request to instruct the jury, and in the Supreme Court, by proper assignment of errors. The reason why, therefore, this court held jurisdiction is apparent. The record in this case is entirely silent upon any such question. Apparently the thought of raising a federal question never originated until the highest court of the state had decided the case, and plaintiff in error filed its petition in the Appellate Court of Indiana for a writ of error.

In *Howard* v. *Fleming*, 191 U. S., p. 137, this court said:

"It does not appear that the federal character of the question was presented to the Supreme Court of the state, although, in the opinion of the Supreme Court, the questions themselves were fully discussed. But in the absence of any claim to protection, under the federal constitution, we are compelled to hold that we have no jurisdiction in the case coming from the Supreme Court of the state, and the writ of error will be dismissed."

In *Beals* v. *Cone*, 188 U. S., p. 184, the rule, as insisted upon by us, is more forcibly stated. This was an action based upon an act of congress. This court says, on page 187:

"From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the constitution or statutes of the United States. No statute of the state of Colorado was questioned, nor was any title, right, privilege or immunity, under the constitution or laws of the United States, specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States, and none of any particular statute. In the motion for a new trial, as well as in the assignments of error, in the Supreme Court of the state, there is not the slightest reference to the constitution, the laws of the United States, or any section or part thereof."

The rule in this court seems to be well settled. There must be, in the state courts, a distinct, special claim of protection under the constitution or laws of the United States. The plaintiff in error having failed to make any such claim, until, upon its petition for a writ of error to this court, no federal question is presented.

Supporting our contention we cite the following additional authorities:

Leigh v. *Green*, 193 U. S. 79;
Mallett v *North Carolina*, 181 U. S., page 589;
Gableman v. *Railroad Company*, 179 U. S. 335;
Defiance, etc., v. *Defiance*, 191 U. S. 184;
Home for Incurables v. *City of New York*, 187 U. S. 155;
Johnson v. *New York Life, etc.*, 187 U. S. 491;
Mutual Life v. *McGrew*, 188 U. S. 291.

This brief on this point is supplemental to the brief on motion to dismiss for want of jurisdiction.

II.

Should we be wrong on the first proposition, and should the court hold that the record in this case discloses that a federal question was specifically set up and claimed in the state courts, and such question is before this court for consideration, then we insist that the judgment of the state court should be affirmed on the merits.

The plaintiff in error filed in the state court an amended complaint in two paragraphs. (Printed Record, pp. 7-12.) The first paragraph is a statutory complaint, wherein plaintiff alleges that it is the owner, in fee simple, of this land, and that the defendants in error set up and assert some title, claim or interest in the described real estate, which constitutes a cloud upon its title, and it prays for a decree quieting its title. Under this paragraph, plaintiff in error, to succeed, must prove a legal title; that is, a chain of title, by deeds, in fee simple. Under the law of the state of Indiana, proof of an equitable title will not support the averments of such a complaint. Proof that the plaintiff in error had an easement would not support the complaint.

Rowe v. *Beckett*, 30 Ind. 154;
Groves v. *Marks*, 32 Ind. 319;
Hunt v. *Campbell*, 83 Ind. 48;
Stout v. *McPheeters*, 84 Ind. 585;
Caster v. *Jones*, 107 Ind. 283;
Johnson v. *Pontious*, 118 Ind. 270;
Town of Freedom v. *Norris*, 128 Ind. 377.

The second paragraph of the amended complaint is based upon an equitable claim to the property. But this paragraph is not in the record, although copied into the record. The defendants in error moved that the plaintiff

be required to make such second paragraph more specific, by showing or alleging what interest, if any, Allison, who made and recorded the plat, relied upon in such second paragraph, had in the land. (Printed record, p. 13.) The court sustained this motion; the plaintiff in error excepted, and says, "that it will not amend said second paragraph by making the same more specific, as ordered, but will abide its exceptions to the ruling of the court, and asks and obtains leave to file a special bill of exceptions number 1 within ten days from the date thereof." (Printed record, p. 13.) This, under the practice in Indiana, was an abandonment of the second paragraph of the complaint.

The matter embraced in pages 15 to 25 of the printed record is not properly in the record. It sets forth the proceedings had in the trial, and judgment, and motion for a new trial as of right, and a vacation of the judgment. By the Statutes of Indiana, in suits to quiet title and in ejectment, the defeated party on the first trial can have a new trial as of right at any time within a year. Of course, the judgment being set aside, the proceedings resulting in that judgment are annulled. (Burns' Revision of 1901, sections 1076 and 1083.)

The defendants in error filed a general denial to first paragraph of amended complaint. (P. 24.) So that the issue presented to the state court was, whether or not the plaintiff in error was the owner in fee simple; that is, had a legal title, by deed, to the lands in controversy.

Evidence.

The only evidence introduced by plaintiff in error to support its legal title was the decree of foreclosure in the case of *Charles E. Bill* v. *The Louisville, New Albany and Chicago Railroad Company et al.*, in the

United States Circuit Court for Indiana. (Printed record, p. 44.) Deed from Howland, special commissioner of the United States Circuit Court, to George F. Talman, issued upon a sale upon said decree. Articles of association of the Louisville, New Albany & Chicago Railroad Company. (Printed record, p. 47.) Articles of consolidation. (Printed record, pp. 50-51.) Mortgage Record of 1886, p. 56. Deed of trust from the Louisville, etc., R. R. Company to The Farmers' Loan and Trust Company, p. 57. Mortgage introduced, p. 71. Deed of trust and mortgage of the Louisville, New Albany & Chicago Railroad Company to the Central Trust Company of New York and John H. Stotsenburg, May 1, 1890, p. 71. Mortgage and deed of trust, same parties, to the Central Trust Company of New York and James Murdock, September 1, 1894, and decree of foreclosure, printed record, p. 116. Special master's report, p. 134. Master's deed, p. 139. Deed of Olcott, p. 144. Deed from Frederick P. Olcott to the Chicago, Indianapolis & Louisville Railway Company, p. 144. Articles of association of the Chicago, Indianapolis & Louisville Railway Company, p. 149.

On the 20th day of February, 1896, James C. Brooks, the only surviving heir at law of James C. Brooks and Mary C. Brooks, his wife, conveyed, by quit claim deed, this property in controversy, to the Louisville, New Albany & Chicago Railway Company. (Printed record, p. 155.) This deed, from Brooks, is the only evidence introduced showing a legal title to the land in controversy in the Louisville, New Albany & Chicago Railway Company. The defendant in error, Hathaway, claims title from the Louisville, New Albany & Chicago Railway Company, by execution against said company and under levy, sale and sheriff's deed. Thus the plaintiff in error and the defendant in error, Hathaway, claimed title from

the same common source. Where title is claimed through a common grantor it is sufficient to trace it to that source.

Wilson v. *Peelle*, 78 Ind. 382, 388;
Wright v. *Tichenor*, 104 Ind. 185, 187;
McWhorter v. *Heltzell*, 124 Ind. 129, 131.

The Brooks deed was dated the 20th day of February, 1896, after the execution of the last of the three mortgages. So the fact that it was property acquired by the Louisville, New Albany & Chicago Railway Company, after the execution of the three mortgages, is established by the evidence of the plaintiff in error.

On the west side of these three pieces of land described in the deed the Louisville, New Albany & Chicago Railway Company and its predecessors had maintained a track and side track and depot for many years before. Mr. Petrie testifies he went to Francesville in 1865. There was a depot building on the west side of this ground described in the deed at that time; had the appearance of being old—ten or twelve years old; there was a railroad track running on the west side north and south; been there ever since. The depot has been there ever since. There were stock pens there. (Printed record, p. 174.)

Except by this deed from Brooks, the only title which the plaintiff in error and its grantors had, as shown by the evidence, was the construction and operation of the railroad, with a depot on the west side of the property described in the deed, which gave the railroad company an easement in the ground thus occupied and used, and no more. It is well settled by the decisions of Indiana that evidence is admissible to show the intention of the railroad company in appropriating the property for railroad purposes, and that the extent of the

user, by the company, as shown by the evidence, is a limit of the rights acquired by the railroad company for railroad purposes. In a word, where a railroad company claims title by use and occupation, so far as it has used and occupied the property, it has rights, but no farther; and the title thus acquired is an easement simply and not a fee.

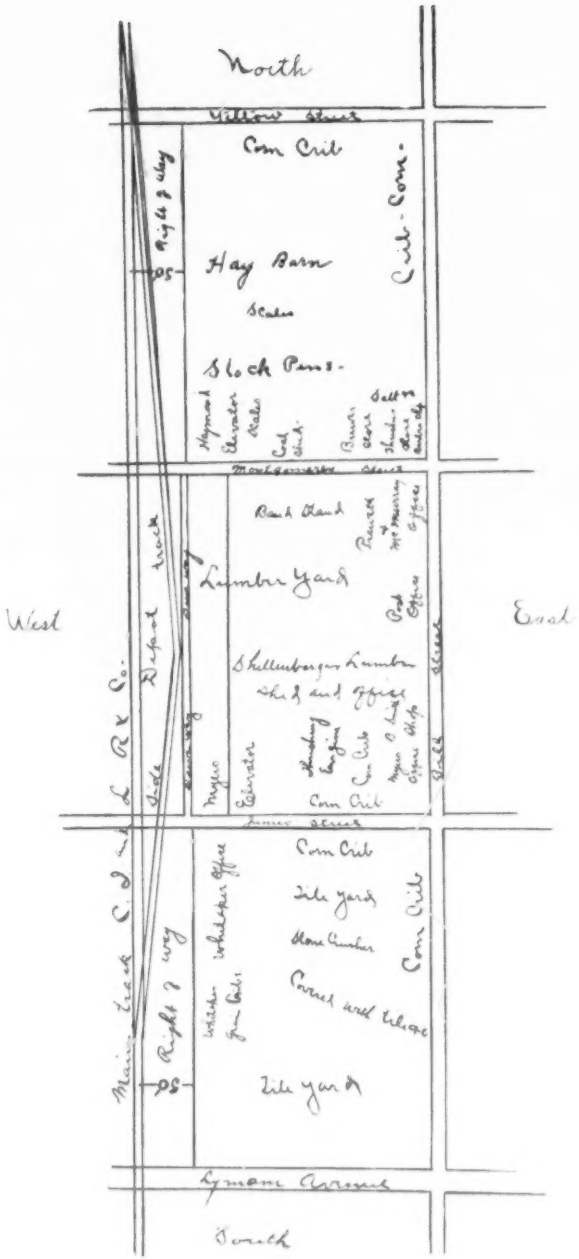
Indianapolis & Vincennes R. R. Co. v. *Reynolds,* 116 Ind. 356;

Ft. Wayne, etc., R. R. Co. v. *Sherry,* 126 Ind. 334;

Indianapolis & Vincennes R. R. v. *Lewis,* 119 Ind. 218;

Lake Erie & Western v. *Michener,* 117 Ind. 465.

The deed from Brooks covers the ground thus occupied by the railroad and used, and also the ground in controversy, which lies east of the railroad's right of way and east of the depot; so that the plaintiff in error showed by this deed of 1896, from Brooks, a legal title in the property in controversy. Both parties claim title from the same common source, to wit: James C. Brooks and wife. At the time of the execution of these several mortgages there was no legal title in the mortgagor to any part of it, simply an easement along the west side of the three tracts of land. The situation of the premises, as described by witness Hathaway, at the time of the execution of the mortgages, and of the deed from Brooks, is best presented by the following plat:


North
Willow Street
Corn Crib
Hay Barn
Scales
Stock Pens.
Crib - Corn -
Hydraulic Elevator Rake
Cob Shed
Boilers
Shafting
Belting
Montgomery Street
Lumber Yard
Rail Road
Planers
Post Office
West
East
Shellenberger Lumber Shed and Office
Engine
Corn Crib
Elevator
Shafting
Engine & Boiler
Office
Shed
Lumber Street
Corn Crib
Coal yard
Stone Lumber
Corn Crib
Corn Crib
Coal yard
Symone Avenue
Bench

McGuire obtained a judgment against the Louisville, New Albany & Chicago Railway Company for damages, for failure to furnish cars to ship hay, in the White Circuit Court, for $2,416.33, September 23, 1896. (See printed record, p. 194.) On the 16th of October, 1897, an execution was issued upon this judgment by the clerk of the Cass Circuit Court to the sheriff of Pulaski county. A levy was made by the sheriff upon the property in controversy, it being all that part lying east of the right of way of the depot grounds of the railroad. It was sold at public sale on the 13th of November, 1897, and bid in by the defendant in error, M. M. Hathaway, for the sum of $2,000, and he received the certificate of purchase. (See printed record, pp. 195-201.) The property was appraised in three separate tracts. (Printed record, pp. 202-203-204.) Being unredeemed, a sheriff's deed was executed to the defendant in error, M. M. Hathaway, on the 22d day of November, 1898. (Printed record, p. 205.) This levy was upon the three lots lying east of the right of way and the depot, which was levied upon as the property of the Louisville, New Albany & Chicago Railway Company, as property acquired by said company, under said deed from Brooks, after the execution of said mortgages. This property, in controversy, was not acquired for railroad purposes, and was not used for railroad purposes, but, on the contrary, it was leased by the railroad company to other parties, upon which had been constructed buildings used for groceries, scales, storing of grain, elevators, post-office, blacksmith shop, corn cribs and barber shops. These facts are not disputed.

M. M. Hathaway, a witness called by the defendant in error, fully describes the property and its condition for twenty years prior thereto. On p. 240 of the printed record, at the close of the testimony, we have the following admission, made by plaintiff in error:

"By Judge Field: The plaintiff will not dispute this state of facts on this question by witnesses, and will not put any witness on the stand on this question, because Mr. Hathaway has stated these locations, and we will dismiss our witnesses on that question."

Page 241 of the printed record, E. H. Applegate, a witness, was called on behalf of the defendants in error. He was asked this question: "Are you acquainted with this ground that was levied upon by the sheriff on an execution against the Monon road?"

Answer. "Yes, sir, I think I know the parts that they levied on; I helped measure the ground."

Q. "During the whole time you have lived at Francesville (he having stated that he had lived there for twenty years), have you ever known any part of this ground to be used by the railroad?"

Plaintiff objected to the question, because it goes back to twenty years, and that is the time that Mr. Hathaway answered in respect to; the plaintiff will not put a witness on the stand on the subject.

By Judge Winfield: "You will not attempt to dispute the fact?"

By Mr. Kretzinger: "We will put no witness on the stand on the subject." So that the testimony of Mr. Hathaway stands uncontradicted. His testimony commences on p. 225 of the printed record.

"He had been acquainted with this ground for eighteen or twenty years; no part of this ground levied upon has ever been used for railroad purposes. It is used by parties for storing corn and grain, by business men, general merchandise business, such as restaurants, groceries and mercantile business; by men with offices for lumber yards. It has a building containing the postoffice, and has had for a number of years; one or two elevators, and used for general purposes, you might say, by the cit-

izens; blacksmith shop on it and lumber yard, and corn crib; also a barber shop; the buildings are frame. The property is situated in the center of the town; the principal street is Bill street; this ground is immediately east of the right of way, west of Bill street, in the town of Francesville, and between Yellow street on the north, running east and west, and Montgomery street, the first street south, running east and west, and between Montgomery, running east and west, and James street, the second lot, and the third lot is between James street and Lyman avenue. The stock pens were not embraced in the levy; no part that is used or ever has been used by the railroad company was levied upon. The depot is on the right of way, on the east fifty feet of the right of way, in the center lot. The right of way is fenced on the north, indicating the line of the right of way. The land levied on is all on the east side of the track, fifty feet from the center of the main track. Francesville has a population of 800 people; these grounds levied upon were leased by the railroad company to people, citizens there, for general business; they stated to me that they were holding the possession of the ground by lease of the Chicago, Indianapolis and Louisville Railway Company; I saw their lease. On the north lot is a hay barn that is now in possession of Prewett & McMurray; there are three corn cribs filled with corn that are used by Prewett & McMurray, but the stock pen was not included in the levy. There is a hog pen on this north lot and a pair of weighing scales for hay and large loads, and that is in the possession of John Coster. The stock pens have been there for twenty years. West of the fence, along the right of way, is the main track and the railroad side track; that fence is fifty feet east of the center of the track; on this north lot is Haymond's grain elevator and scales; they were there when the levy

was made, also a salt bin and store house for salt, and those things connected with a grocery store not ordinarily kept in the store, to be used by Mr. Brewer; then comes the Brewer store, and on the corner is a building occupied by Wood Thrasher, in which he has a barber shop and ice cream parlor and a restaurant. Montgomery street, south of the north lot, is an improved street; the street has been there ever since I knew the town. These buildings I speak of front south on Montgomery street. The middle lot levied on is south of Montgomery street and extends from Bill street west 120 feet, and upon this we first have an office, a grain office, that is used by Prewett & McMurray; west of this grain office is a band stand, which has recently been torn down; there are sheds and lumber up to a little road between this point and the part levied upon; this office fronts on Bill street; next to Prewett's office is the postoffice; the postoffice faces east; next to the postoffice is an office used by Shellenbarger for a lumber office; next to his office is a lumber shed, occupied and used by him for storing his better grade of lumber; the lumber shed and the lumber extends back, covers the part levied upon, all of it; probably been there five years; he said he had leased this property from the railroad company; south of Shellenbarger's lumber yard is a blacksmith's shop; it has been there three or five years, occupied by one Nelson, who is carrying on the business. The balance of that middle lot is occupied by Joseph Myers & Son for an elevator and a private office, and south of their office is a couple of corn cribs, quite lengthy corn cribs, filled with corn, and then immediately back of the corn cribs is an elevator, in the southwest corner of this tract that was levied upon; a grain elevator, used by Myers & Son in their business; they said they were there under a lease from the railroad company. In addition to this,

and scattered over the south end of the middle lot, in the space that is not covered by buildings, there are some old threshing machines and engines, not railroad engines, but threshing machine engines. All the middle lot, at the time of the levy, and up to the present time, was occupied and used for private purposes; no part of that middle lot has been used by the railroad for railroad purposes; it has been used just as I have described it here; there is a driveway between this property levied on and the side track to the depot that is used for loading and unloading and hauling lumber, but that driveway is west and outside of the ground that was levied upon. The depot is reached from either end, but not over the ground levied upon. James street is a traveled street; west of the grain elevator is the right of way of the railroad company, a grain elevator and side track; no part of the layout of the road is on this middle lot; south of James street, the third lot—on this is an office occupied by Whittaker; south of that is Whittaker's bins or cribs for storing corn and a corn sheller, and an outfit of that kind; the northeast corner is a large corn crib that is owned and used and occupied by this man Whittaker; at the time it was levied upon it was dotted over pretty much by tile; the tile is scattered promiscuously over the lot; there is now a stone crusher outfit standing there; I don't know who that belongs to; south of the south lot is Lyman avenue, a traveled street; on the right of way of the railroad, west of the grain elevator levied upon, besides the depot and the cattle pens, the railroad has a tool or car house, which is on the right of way; none of it is on this ground; this railroad runs from Michigan City to Monon."

When the Louisville, New Albany & Chicago Railroad Company purchased this property, in 1896, this was its condition, and afterwards it leased these buildings, scat-

tered over this property, to various parties. No part of it had ever been used for railroad purposes, and there was no intimation that any part of it would be used for railroad property. It was not purchased nor used for railroad purposes.

The question at issue is, whether or not the decree of the United States Circuit Court, based upon these three mortgages, embraced this particular property levied upon?

Meaning of Mortgages.

The Appellate Court of the State of Indiana, in its opinion, has correctly stated the provisions in the three mortgages with reference to after-acquired property. The opinion is on page 250 of the printed record. We quote from the opinion:

"In the mortgage of 1886 the description of after-acquired property is as follows: 'Which may at any time hereafter, during the continuance of this trust, be acquired by the said railroad company for purposes connected with, or appertaining to the railroad or railways, above mentioned or described.'

"The description of the after-acquired property, in the mortgage executed in 1890, was in the following words: 'And all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described.'

"The description of the after-acquired property in the mortgage executed in 1894 was in the following words: 'What may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with, or appertaining to said railroads, or railways, hereby conveyed.'"

In the Appellate Court of Indiana it was admitted in the original briefs on both sides that the above quotations correctly stated the provisions of the mortgages in reference to after-acquired property.

It is now claimed that the mortgage of 1890 contains other provisions broad enough to embrace land not acquired for railroad purposes. In this we think counsel for plaintiff in error are mistaken. The mortgage of 1890, page 71 of the printed record, contains the following provisions in the granting clause:

"And also all other railroads, extensions and branch lines which the railway company, party of the first part, may, at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the state of Indiana or in any other state, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company, and all that it may in the future *add, construct or acquire,* for the purpose of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned or hereafter to be constructed or acquired," etc.

Again:

"It being the true intent and meaning of these presents and that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate; all and all manner of real estate and interest therein, wherever such real estate may be situate, and all and all manner of personal property of whatever nature or description, the same may be, at the date of these presents owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company, for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to

be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the state of Indiana, and also all choses in action, of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchise hereby conveyed; and also all franchises and property and all personal rights or interest in any franchise or property, of every kind and description, real, personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall inure, by way of accretion, to the benefit and advantage of said trustees, by way of further and better security for the bonds to be issued hereunder."

Thus, in one clause it is stated that after-acquired property is property acquired for railroad purposes, and then it is declared to be the intention of this instrument that it shall embrace all after-acquired property obtained for railroad purposes. Then follows the clause upon which counsel for plaintiff in error are now basing their contention:

"It being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railroad company, and were specifically described herein and conveyed hereby."

Counsel for plaintiff in error conceded in the Appel-

late Court of Indiana that the first clause governed, but having discovered that their position is untenable, and that their client can not hold this property under that clause in the mortgage, they now ask to eliminate the first and second clause herein quoted and consider solely the last clause.

We have set out the granting clause, and the one relied upon by plaintiff in error might be denominated the *habendum et tenendum*. It is formal and not intended to embrace property not covered by the granting clause.

The clause, "It being intended and hereby expressly covenanted," etc., stands, with relation to the preceding clauses, as if it were found in the habendum clause, and it seems to be well settled law that the subject-matter of a grant can not be enlarged by such a clause.

Thus, in Washburn on Real Property, 4th edition, 3d volume, on page 438, it is said:

"The habendum may enlarge, expound, qualify or vary the estate granted in the premises, but it can never extend the subject-matter of the grant."

In *Manning* v. *Smith*, 6 Conn. 289, the habendum clause read: "To have and to hold the premises with all their appurtenances unto the said," etc. It was held by the Supreme Court of Connecticut that the appurtenances did not pass, it being said:

"The subject-matter of the grant in the deed is the land, but that does not include the easement, as we have seen. Can, then, the thing granted be enlarged by the words 'to have and to hold with the appurtenances?' It is in the premises of the deed that the thing is really granted." (Citing numerous authorities.) "It is the office of the habendum sometimes to enlarge the estate granted, but never to extend the subject-matter of the grant, as was correctly laid down by the counsel for the defendant."

Clearly the last clause in the mortgage of 1890 was intended to serve the purposes of a habendum clause, namely, to explain and make clear what had gone before. The granting clause of the mortgage had already declared that the mortgage should cover all after-acquired real estate acquired for railroad purposes; and when, in the later clause it is said, "It being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, which the said railway company now owns or at any time hereafter may own," it is clearly understood to mean any real estate which the company may hereafter own for railroad purposes.

A specific description always controls a general. This is axiomatic in the construction of deeds. The first clause specifically mentions the real estate intended to be mortgaged; that is, the real estate the company now owns and all that it might thereafter acquire for railroad purposes. And in the second clause this is declared to be the intention of the mortgage, and it is ridiculous to suppose that these two clauses are rendered meaningless by the after clause quoted. It can not be presumed it was in the mind of the mortgagee and mortgagor that the mortgagor would acquire any real estate except for railroad purposes. It can not be presumed that the mortgagee anticipated that the company would go into the real estate business and buy lands for speculative purposes, and lease the same to private parties for general business. They must have had in mind the charter rights of the company in the acquisition of real estate. Under the laws of Indiana the company could only acquire real estate for purposes connected with its road.

Statutory Policy.

Section 5150, Burns' Revision of 1901, which has been the law ever since 1852, authorizes the railroad company to receive, by purchase or subscription of stock, lands, and to hold and convey the same, that may be necessary for the purpose of erecting depots, turnouts, workshops, warehouses, or for any other purpose necessary for the convenience of said company, in order to transact the business usual for railroad companies.

Section 5151 provides, that by order of the board of directors, the company may receive lands, in payment of subscriptions of stock, but said section contains the following proviso: "That the same shall be sold (except so much as may be necessary for the use of said roads or for the purpose aforesaid) within a reasonable time, and the proceeds applied for the construction of said roads or their appurtenances," the clear intention of the legislature being, that while a company may receive lands as subscription for capital stock, the same must be sold within a reasonable time and the proceeds thereof used in the construction of the road. It is not intended that the railroad shall go into the real estate business. Such a course would be against the policy of the state—otherwise a railroad with enormous capital might buy up large tracts of land and hold them indefinitely.

Section 5152 provides that it shall file a map and profile, showing what land it needs for its road.

The second clause of section 5153 provides that the railroad may receive, hold and take such voluntary grants and donations of real estate and other personal property as shall be made to it, to aid in the construction, maintenance and accommodation of such railroads, but the real estate thus received by voluntary grants

shall be held and used for the purposes of such grants only.

Here we find another express limitation upon the powers of the company. Clause 3 of the same section provides that it may enter upon and take possession of such lands only as may be necessary for its road.

Clause 7 provides that where it changes the route of its road it may take lands necessary for the new route. Thus it is manifest that the policy of the state of Indiana, as declared by the legislature, is against a railroad corporation purchasing or acquiring lands for any other purpose than to aid in the construction of its roads, and for its maintenance and operation. Therefore, when this mortgage of 1890 was executed it was understood to embrace such after-acquired property as the company might lawfully acquire for the purpose of aiding in the construction of the road, and to maintain and operate it, and none other. That this was so understood is manifest from the mortgage itself. The clause, "and all that it may in the future add, construct or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described," is a restrictive clause showing that the parties to the mortgage had in mind such lands as the company might thereafter acquire lawfully under the statutes of the state. This was so understood by appellants' learned counsel upon the original hearing in the state courts before they received a new revelation.

We quote from their original brief in the State Court:

"The primary and general test is, if the company was authorized to appropriate the land for railroad purposes, then it will be held as embraced within the usual covenants of the mortgage respecting after-acquired property."

We accept this test as a fair construction of the laws of the state of Indiana in the Appellate Court. The Appellate Court of Indiana has applied the test, and has held that where real estate is acquired after the execution of a mortgage, for other than railroad purposes, the mortgage will not attach.

The section of the statute quoted by counsel, section 5212 of the Revised Statutes of 1901, so far as it refers to after-acquired property, must be construed to mean such after-acquired property as the company might, under the laws of Indiana, acquire, by condemnation, for the construction, maintenance and operation of its road. The general authority to mortgage present and future-acquired property must be construed in the light of the charter rights of a company. It would be absurd to say that in the granting of authority to railroad corporations, specifying what powers they may possess, there is a limitation as to the kind of property they may acquire, and how they may hold it, but in a general statute providing for the mortgage of a railroad authority is given to acquire real estate indefinitely and for any purpose, with authority to mortgage the same.

We concede, if the railroad does acquire property not needed for railroad purposes, no one can question its right to hold it except the state, but what we are saying is, this property, as between McGuire, the judgment creditor, and the mortgagee, under the mortgages of 1886, 1890 and 1894, McGuire has a right to say, this is the property of the old company; it did not pass to the new company under the mortgages.

Another test might be applied. If this company had acquired this property by deed, and it was used in the manner described in the testimony of Hathaway, and the state had instituted *quo warranto* proceedings to know by what authority the railroad company was holding the

property and leasing the same to the parties, in the manner described in the testimony of Hathaway, there can be no question but that such action would result in dispossessing the company of its title. (*The Bank of Vincennes* v. *The State*, 1 Blackford, p. 267.) But that it did not pass under the mortgages, and decree of foreclosure, to the plaintiff in error, is well settled by an unbroken line of decisions.

Decisions.

Seymore v. *Canandaigua, etc., R. R. Co.*, 25 Barb. 284, is a case in point. It was a suit between a creditor and a purchaser under the mortgage. The railroad mortgage contained the following clause: "Grant, convey, transfer and set over the said railroad constructed and to be constructed, together with all and singular the railways, rails, bridges, fences, privileges, rights and real estate now owned by said company, or which shall hereafter be owned by them." (Page 288.)

The court, on page 307, referring to the above clause in the mortgage relating to future-acquired property, says:

"The description in the mortgage of the land acquired and to be acquired must be deemed to refer to the charter, and the law defines the land which the mortgage is designed to cover, and the lien of the mortgage clearly attached to such unacquired land so soon as the title thereto passed to the corporation."

It was, therefore, held, that although the mortgage in terms was intended to cover all future-acquired real estate, it must be limited to such real estate as it had a right to acquire under the law for railroad purposes;

that is, by condemnation. But in the mortgages in question it is specified that the future-acquired property is such property as the railroad might acquire for railroad purposes.

On page 312 the court quotes the charter of the company. It is identical with the railroad law of the state of Indiana, and says:

"Under this provision the company was authorized to purchase and hold such lands as were necessary for depots, stations, warehouses, wood-yards, shops and other legitimate purposes. All such lands, with the erections thereon, would pass to the complainants, under their mortgage, as part of the railroad, or as essential to its use and enjoyment. But lands acquired by the railroad company, and not thus used or employed for railroad purposes, would not come within the description of the mortgage."

Again it says:

"It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes. That in some instances whole lots were purchased to secure a right of way across them. If the railroad company, for this purpose, had purchased a lot of ten or one hundred acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or other legitimate purposes, the lien of the defendants' judgment must prevail."

The conclusion of the court was that all lands acquired subsequent to the mortgage, not used for railroad purposes, were not embraced in the mortgage.

Shamokin Valley R. R. Co. v. *Livermore*, 47 Penn.

State 465, is squarely in point. The real estate in controversy was adjacent to the right of way of the company. The court holds, they were not appurtenant, in the legal sense, to the railroad, by any grant, deed, writing or act in the law capable of so doing; and holds that land can not, of itself, be appurtenant to other land, except by incorporation, and then the operation is by union of identity and not by servitude. The court says:

"Before these lots could become incorporated with the ordinary franchise of the company it needed some definite, clear and well defined acts of the company to produce the incorporation."

Like the company in this case, it was holding these lots for profit and leasing them, and the court adds, upon this branch of the case:

"Now the Danville & Pottsville Railroad Company holds these lots by deed, independently of their railroad franchise, and as they had the power of drawing profits and of selling as a natural person might, it follows that, *prima facie*, there was a right to levy the property in executions, and sell it for the debts of the company, and a good title would pass unless the fact of incorporation with the franchise, and a consequent subordination thereto, could be shown to have preceded the levy and sale. The case was, therefore, clearly one which turned upon this question of fact."

So we say here, these lands, under the testimony of Hathaway, had never been incorporated with the franchise of the railroad company, and as found by the Appellate Court of Indiana, they had been held and used ever since the company acquired title for other and different purposes than railroad purposes, and the railroad company was deriving a profit therefrom by the leasing of the same. The court in this case adds:

"What was the effect of the sheriff's sale on the company's title? They had very express authority, by the incorporating law, to buy, hold, mortgage and sell lands; in locating their road they probably found it expedient to buy the Lukens farm rather than pay damages for crossing it. This is often the true policy of railroad companies. But lands so bought and not actually dedicated to corporate purposes are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff, in the same manner and with the same effect as the lands of any other debtor."

The same doctrine is announced in *No. Pac. R. R. Co.* v. *Parker*, 143 U. S. 42. We quote simply from the syllabus:

"A mortgage by a railroad company of its railroad, rights of way, roadbed and all its real estate then owned or which might be thereafter acquired appurtenant to or necessary for the operation of the railroad, and all other property wherever situated in the state, then owned or which might thereafter be acquired by the company, and which should be appurtenant to or necessary or used for the operation of its road, and also the tenements, hereditaments and appurtenances thereunto belonging, does not cover a grant of lands within the state subsequently made by congress to the company in aid of the construction of its road."

The lower court so held, on the theory that it was not contemplated at the time the mortgage was executed, that the railroad company would acquire land except for railroad purposes.

See *Boston & N. Y. Air Line Co.* v. *Coffin*, 50 Conn. 150;
Mississippi Valley Co. v. *C., St. L. & N. O. R. R.*, 58 Miss. 846;
Eldridge v. *Smith*, 34 Vermont 484;
Pardee v. *Aldridge*, 189 U. S. 429.

The authority of a company to bind its future acquisitions, by mortgage, is limited to such property as it has the power, by law, to acquire.

Jones on Mortgages, sections 155 and 157;
Meyer v. *Johnston*, 53 Alabama 237 and 331;
State v. *Glenn*, 18 Nevada 34;
Mississippi R. R. Co. v. *Chicago R. R.*, 58 Miss. 896;
Maxwell v. *Wilmington, etc., R. R. Co.*, 77 Fed. 938;
Morgan v. *Donovan*, 58 Ala. 241.

In order that the mortgage should cover after-acquired real estate it must be necessary to preserve the road intact. This is on the ground of public policy.

Cook on Corporations, 5th ed., 857.

The Appellate Court of Indiana correctly interpreted the three mortgages, and its decision declares the law strictly in accordance, not only with the current decisions of the courts of other states, but with the decisions of this court.

Pardee v. *Aldridge*, 189 U. S. 429.

It never entered the mind of the attorneys for plaintiff in error, when they obtained a decree foreclosing the three mortgages in the United States Court, that the mortgage of 1890 embraced property not embraced in the mortgage of 1886 and 1894.

The decree is an entirety and covers only such property as is covered by the mortgage of 1886 and 1894. If they were claiming greater rights under the mortgage of 1890, such rights or claim would have been set forth in the decree, but having failed to claim any greater rights under the mortgage of 1890 than they had under

the mortgage of 1886 and 1894, at the time of the foreclosure proceedings, they must be deemed and held to have waived any such additional claim or right.

III.

The Interpretation of the Decree.

If this court holds that it has jurisdiction, on the ground that the Appellate Court of Indiana interpreted the decree in the United States Court, then we insist that there can be no interpretation of this decree which would give this land to the plaintiff in error. We contended, in the Appellate Court of Indiana, that after-acquired property, to pass under a decree upon a mortgage, must be described in the decree; that the bill must describe the property acquired subsequently to the execution of the mortgage, so that the decree may set it out. Under the laws of Indiana, and as held by this court, a decree for the sale of lands, to be effective, must so describe the lands that the same may be found by the sheriff, or other officer executing the process of the court, by reference to the decree itself, without the aid of extraneous evidence. The Appellate Court did not deem it necessary to pass upon this question, for the reason that, as the mortgage only attached to real estate, subsequently acquired for railroad purposes, and as this land was purchased and held, not for railroad purposes, the lien of the mortgage did not attach.

But should we be in error upon the question of jurisdiction and the true interpretation of the mortgage, and should this court hold that property like this might pass and was covered by the mortgage, then this court must interpret this decree.

We insist that the undisputed evidence is, that this

land was not a part of the layout of the road, and not being a part of the layout of the road, before it could pass by judicial sale the decree must specifically describe it so that the land might be identified and the court might put the purchaser in possession, from the description of the decree itself, without reference to extraneous evidence.

In the leading case in Indiana, *Bowen* v. *Wickersham,* 124 Ind. 404, it was held, in an action to recover title passed upon judicial sale, that "it must appear from the decree and deed through which he claims, without the aid of extraneous evidence, that the title to lot No. 9 is in him. * * * A description in a deed or mortgage may be sufficient even though it may be necessary on account of its imperfect or indefinite character to aid the intention of the parties by averring and proving extraneous facts. This rule has, however, no application to a description found in a decree of foreclosure or in a conveyance made in pursuance thereof. Descriptions of land found in judicial decrees or sheriff's deeds can not be reformed or aided by invoking the chancery powers of the court. *Lewis* v. *Owen,* 64 Ind. 446; *Dale* v. *Travelers Ins. Co.,* 89 Ind. 473."

"Where the description as contained in a mortgage, or other instrument, is imperfect or indefinite, the land actually mortgaged or conveyed should be accurately described in the bill or complaint to foreclose, and the description in the decree should be so reformed that the officer may know on what land to execute the order of the court. *Struble* v. *Neighbert,* 41 Ind. 344; Jones Mort., section 1862. The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the deed. *Cunningham* v. *McCollum,* 98 Ind. 38; *Runnells* v. *Kaylor,* 95 Ind. 503."

"If the decree and deed are so defective that it can not be ascertained by inspection, or from data which they furnish, what property was, in fact, sold, or if, in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void for uncertainty. Freeman Ex., section 281."

Short's Law of Railway Bonds and Mortgages, section 204, says:

"It has been said that there is not the same necessity for a particular description in railroad mortgages as in mortgages by private persons. But this statement seems to be incorrect. *Mutatis mutandis,* the requisites of a valid mortgage of after-acquired property are the same whether the mortgagor is a railroad company or an individual."

All that passed under this generic description contained in the decree was what is known as the railroad, which includes its right of way, railroad bed, side tracks, depots and stations; that is, *the property actually used in the maintenance and operation of the road.*

The same author, in the same section, says:

"If the property has no immediate connection with the operation of the road, a merely generic description will not fasten a lien upon it. The language used must, in this case, be sufficiently specific to designate the property, without reference to extraneous circumstances. This distinction is fundamental, and pervades all the cases which turn upon the sufficiency of the description."

If it is intended to sell, under the decree, after-acquired property, it should be set up in the bill, otherwise it will not pass under the decree. Jones on Mortgages, section 1581; *Kreichbaum* v. *Melton,* 49 California 50; Jones on Mortgages, section 1462; *Triplett* v. *Sayre,* 3 Dana 590; *Struble* v. *Neighbert,* 41 Ind. 344; *Magee* v.

Sanderson, 10 Ind. 261; *Whittelsey* v. *Beall*, 5 Blackford 143; *Davis* v. *Cox*, 6 Ind. 481; *Cecil* v. *Dynes*, 2 Ind. 266; *Nolto* v. *Libbert*, 34 Ind. 163; *White* v. *Wyatt*, 40 Ind. 385.

This court, in *Gray* v. *Brignardello*, 1 Wallace 627, in speaking of the defective description in the decree, says:

"Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court, which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree, yet, if he does sell, his act is without authority of law, and is void."

To have authorized the sale of this land, it not being a part of the layout of the road, and the property being occupied by persons engaged in general business, the bill or complaint should have described it, setting forth that it was after-acquired property and asking for an order that it be sold. Then the court might possibly have been authorized to have entered a decree against this property, and, if described in the decree, the decree would have authorized the sale. Unfortunately, whether for plaintiff in error or for us, the plaintiff in error did not introduce the original bill, upon which the foreclosure was had. Had the decree described this property the court might have presumed that the bill contained a description of the property, but as the decree does not describe the property, it must be presumed that the description in the decree follows the averments in the complaint. Now, how could the United States Court put the purchaser in possession of this property? If the officer had gone to Francesville he would not have found the rail-

road company in possession of this property, but would have found it covered with buildings and business houses occupied by private citizens, engaged in general business. The decree would furnish no aid whatever.

It would be useless to prolong this argument and cite additional authorities. Under no interpretation of the decree of the United States Court can it be found that this land, held and occupied, as described, ever came within the jurisdiction of the United States Circuit Court. No question as to the title of this land was presented to the United States Circuit Court. It is an axiom of the law that only such questions are decided by courts as are within the issues. By no inference from the record introduced from the United States Circuit Court can it be said that the ownership of this property was in issue. Therefore, this decree could not act upon this property. It does not pretend to. The title of plaintiff in error is under this decree, and it takes title only to such property as was authorized to be sold under the decree.

IV.

Errors Relied Upon in the State Court.

We submit, in confidence, that the rulings of the Circuit Court of Indiana, on the admission and rejection of evidence, do not present any federal question. The legal question, whether the alleged plat of the town of Francesville was competent or incompetent evidence in that court, is not a federal question. The evidence offered, of assessments paid for street improvements by plaintiff in error, and rejected by the Circuit Court of the state, presents no federal question.

The State Court was clearly right, under the laws of Indiana, in excluding the evidence. Relying, in its complaint, upon a fee simple title, evidence tending to show that it had some sort of an equitable title was incompetent. Had the plaintiff in error set out in the complaint his source of title to this property, and the Circuit Court of the United States had held that the title was good, and that the property was covered by the mortgage, a different question would have been presented. It does not appear that Allison ever owned the lands. (See purported plat.) Said plat was invalid for the following reasons:

1st. No grantee was named capable of taking the grant. There is nothing on the plat to show that these grounds in controversy were dedicated at all.

County Commissioners of Hennepin Co. v. *Dayton*, 17 Minn. 260.

2d. There can be no dedication for railroad purposes at common law.

Todd v. *Pittsburgh R. R. Co.*, 19 Ohio St. 514;
R. R. v. *Whitham*, 155 Ill. 514;
Commissioners v. *Dayton*, 17 Minn. 260.

3d. The plat must be by the owner.

Elliott on Roads and Streets, page 105;
City of Lawrenceburgh v. *Wesler*, 10 Ind. App. 153.

4th. The land dedicated must be described with sufficient particularity to enable a surveyor to find it from the data. The dedication can only be proved by the plat itself.

Elliott on Railroads, section 947.

There was no description of any land. The legalizing act of 1895, section 4238a, was intended simply and solely to legalize plats of towns and cities which had been recognized and lots sold, streets made and improved, in reference thereto, and had been acted upon for a number of years. For instance, if lot 4 of Jones' Addition to the City of Indianapolis was sold by that description, by a chain of title, but the plat had never been properly executed, the purpose of the act was to legalize such plat, so as to perfect the chain of title. But such act was never passed for any such purpose as contended for by counsel. They offer no evidence that a single lot had ever been sold by this plat or that a single lot described in this plat had ever been taxed. On the contrary, the only evidence offered by the appellant was that three lots had been assessed to the railroad, without any reference to any plat whatever.

If we concede, for the purpose of the argument, that the Circuit Court of Indiana erred in rejecting the plat as evidence, how can that aid the plaintiff in error in this court? No federal question was involved, and it would only tend to show that the railroad company had acquired, by this litigation, an easement in the property, and proof of such easement would not support the averments of the amended complaint.

ERRORS COMMITTED IN THE STATE COURT IN THE REJECTION OF EVIDENCE ARE NOT REVIEWABLE IN THIS COURT.

Whether the State Court committed an error in rejecting the offered evidence of taxes paid for street improvements or improvements made upon the property, is not a federal question. Likewise whether the State Court

erred in refusing to admit as evidence the alleged plat of the town of Francesville. Likewise any error that may have been committed in the State Court in ruling upon questions of pleading or practice does not raise a federal question.

In *Mackay* v. *Dillon*, 4 Howard 421-447, it is stated by this court:

"The powers of the Supreme Court are limited in cases coming up from the state courts under the twenty-fifth section of Judiciary act to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United Statets, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant can not raise a question involving either the validity or construction of an act of congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact."

In this appeal the writ of error is without merit. If the motion to dismiss should be overruled, we ask that the judgment of the State Court be affirmed upon the merits.

Respectfully submitted,

M. WINFIELD,

W. H. H. MILLER,

Attorneys for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

No. 69.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY, *Plaintiff in Error,*

v.

PATRICK MCGUIRE AND OTHERS, *Defendants in Error.*

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANTS IN ERROR.

Our original brief in this case was in print before we received the brief for plaintiff in error. We therefore beg to submit the following by way of supplement and reply:

I.

JURISDICTION.

Section 709, R. S. U. S., provides for three classes of cases in which this court may review on writ of error the decisions of a state court.

First. In case of any final judgment or decree, where is drawn in question the *validity* of a treaty or statute, or an authority exercised under the United States, and the decision is against their *"validity."*

Second. Where is drawn in question the validity of a statute or of an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity.

Third. Where any title, right, privilege or immunity is *claimed* under the constitution, or any treaty or statute or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity *specially set up or claimed* by either party under such constitution, treaty, statute, commission or authority.

McKenna v. *Simpson,* 129 U. S. 506.

It is, of course, entirely clear that this case does not belong to the second class. This case, if properly here, is here as belonging to the first class or to the third class, but it is entirely clear that it does not belong to the first class. There is no question here of the *validity* of a treaty or statute, or of an authority exercised under the United States. The validity of the decree of the United States Circuit Court, offered in evidence by plaintiff in error, was never disputed by any one, nor was its authority. It was conceded to be a valid decree by all par-

ties to the litigation. The only question was as to its meaning, its legal effect; that it was the decree of a court of competent jurisdiction binding all parties according to its terms, and that it imported absolute verity was and is undisputed. And the "authority" of the United States and of its court to make a binding decree in the premises was and is unquestioned and unquestionable. And the state court never questioned, much less made a "decision against its validity."

That being so, this case is eliminated from the first class as well as the second class provided for in this section of the statute. Under this provision for the first class it is not necessary that the treaty, statute or authority of the United States shall be "specially set up or claimed." And for the very sufficient reason that when a decision is made against the validity of a treaty or the validity of a statute, or the validity of an authority exercised under the United States, the federal question is necessarily involved and determined.

No court can decide that a statute and treaty or an authority exercised under the United States is invalid without deciding a federal question. But, as before stated, no decision has been made in this case touching such validity, and therefore this case is not here as one of that class.

Coming to the third class, however, we have a case the decision of which may or may not involve a federal right, and hence it is necessary, in order to bring the case within that class, that the federal right relied upon shall be, in the language of the statute, "specially set up or claimed."

In this third class the question is not of the validity of a statute or of a treaty, or of an authority, but the question is whether a party has a title or a right or a privilege or an immunity, and this he may have by vir-

tue of the constitution or statutes of the state, by virtue of the guarantees of the common law or the principles of jurisprudence, or by virtue of the guarantees of the federal constitution and laws. And, this being so, if his reliance is upon the federal law, according to the language of the statute, he must "specially set up and claim" its protection. Otherwise he might make his case in the state court on the claim of state authority, or common law authority, or the general principles of jurisprudence, and in the federal court rely wholly upon federal authority.

In other words, it seems to us plain that whenever a party is asserting a right, title, privilege or immunity under the third clause of this section in order to give this jurisdiction he must specially set up that fact. And such we understand to be the decisions of this court. Otherwise the words "claimed" and "specially set up or claimed" signify nothing.

Keeping these distinctions in view it is not difficult to classify the cases. Where the *validity* of any treaty, statute or authority exercised under the United States is involved, and the decision is against that validity, there is necessarily jurisdiction here.

Wherever, on the other hand, the question is of a title, a right, a privilege, or an immunity,—in short, where a party has a law suit that may or may not turn upon a federal treaty, statute, or authority, he must, if he would have the ultimate decision of this court, claim and specially set up that treaty, statute or authority in the state court.

Oxley Stave Co. v. *Butler County*, 166 U. S. 648;

Columbia Water Power Co. v. *Columbia Electric, etc.*, 172 U. S. 475;

Home for Incurables v. *City of New York*, 187 U. S. 155;
Layton v. *Missouri*, 187 U. S. 356;
Jacobi v. *Alabama*, 187 U. S. 133.

That no such claim was made or specially set up in the state court in this case is admitted by plaintiff in error, unless the mere fact that it deraigned title through the decree of foreclosure is such claim. But that it ***is not*** such claim has been repeatedly adjudged.

In *Bausman* v. *Dixon*, 173 U. S. 113, a receiver appointed by a federal court, against whom a judgment had been taken in a state court, attempted by writ of error to obtain a review of the judgment by this court. This court says:

"We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver the judgment against him amounts to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a federal question under section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order."

So, in *Western Union, etc.*, v. *Ann Arbor, etc.*, 178 U. S. 239, this court denying a right of removal on account of a supposed federal question, says:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground. *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199; *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571."

Again, in *Gableman* v. *Peoria, etc.*, 179 U. S. 335, this court declared that a receiver appointed by the United States Circuit Court, in the exercise of its general equity powers, was not in the exercise of a federal authority within the meaning of the judiciary acts. On page 340 it is said:

"The question is whether the bare fact that the appointment of this receiver was by a federal court makes all actions against him cases arising under the constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that constitution or of these laws; and that his liability depends on general law, and his defense does not rest on any act of congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined, as the Circuit Court of Appeals properly held in this case. *Bausman* v. *Dixon*, 173 U. S. 113; *Pope* v. *Railway Company*, 173 U. S. 573; *McKenna* v. *Simpson*, 129 U. S. 506; *Provident Savings Society* v. *Ford*, 114 U. S. 635."

Again, on the next page, quoting from the opinion in *Pope* v. *Louisville, etc.*, 173 U. S. 573, it is said:

"The bill nowhere asserted a right under the constitution or laws of the United States, but proceeded on common law rights of action. We can not accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under the general law, and was neither created nor arose under the constitution or laws of the United States."

Exactly in point, also, is *Marrow* v. *Brinkley*, 129 U. S. 178.

In that case certain property of Parker West had been sold in 1864 under the Confiscation Act of Congress of 1862. Notwithstanding such sale, a proceeding had been taken in a state court of Virginia to subject that property, together with other property of Parker West, to the payment of his debts, and a decree had been entered against him in 1870 to that effect. In 1871 Parker West died, and in 1872 his heirs, or some of them, were made parties in the state court and a decree rendered against them.

In January, 1886, these heirs filed a bill in the State Circuit Court setting up that Parker West's title had

been divested by the sale under the Confiscation Act and that they, the heirs, never appeared in the cause in the state court either in person or by attorney; that the proceedings whereby their appearance in the cause was shown were fraudulent, and they asked to have the decree set aside as to them.

The state court ruled against them and dismissed the bill for want of equity. This decree was affirmed in the Court of Appeals of Virginia, and a writ of error sued out from this court. A motion to dismiss for want of jurisdiction was presented in this court. It was held that, notwithstanding the heirs were setting up a claim under the statute of the United States and the proceedings thereunder, yet that the decision of the state court in no way questioned the validity of that statute or any construction of it, but was based upon other grounds not involving a federal question, namely estoppel and laches, and the motion to dismiss was sustained. Just so in the case at bar, the decision of the state court was based on the insufficiency of the description of the lots, and involved no federal question at all.

All of these quotations show that to claim and specially set up a federal question much more is necessary than to merely make claim of title to property through the decree of a United States court, exercising its chancery powers in a case where its jurisdiction rests entirely on diverse citizenship.

In the decree relied upon by plaintiff in error in the case at bar no question of federal law or federal authority was involved. The jurisdiction of the United States Circuit Court for the District of Indiana in that foreclosure case rested entirely on diverse citizenship; the decree of foreclosure was made solely in the exercise of its general equity powers, and the only question mooted upon the decree in the White Circuit Court and

the Indiana Appellate Court was whether the description of the property in the mortgages and in the decree was sufficient to carry title to the town lots in dispute.

The question was and is exactly the same as it would have been if the suit for foreclosure had been in the White Circuit Court and the decree had been entered in that court, which might well have happened, since that court and the United States court had concurrent jurisdiction in the premises.

The question is not of the authority, or verity, or credit of the decree, but what is the meaning of the words used; and that meaning is the same in this as in any other decree of like character.

Indeed, as to the matter of description the United States court did not attempt to use any language except quoting from the mortgages themselves, so that the construction of the language in the descriptions in the decree is the construction of the language of the mortgages, no more and no less. (Transcript, pp. 117, 120 and 122.)

That this matter of description presents no federal question is well shown by an illustration. Suppose a decree of foreclosure in a federal court against the northeast quarter of a given section of land, and suppose that in a proceeding in a state court that decree is offered as evidence of title to the northwest quarter of the same section, would the refusal of the state court to give it effect against the northwest quarter raise a federal question?

Or, suppose the decree in the federal court described only lot one in a given town plat, and that decree was offered as evidence of title not only in lot one, but in lot two also, would the state court's confining the effect of the decree to lot one be a decision against the authority of the United States? It seems to us the proposition is wholly untenable.

But this case lacks another element essential to make a federal question. It is only where the decision is against the title, right, privilege or immunity set up or claimed that section 709 gives jurisdiction to this court. In the case at bar the decisions of the state courts not only do not deny the authority of the decree of the United States court, but expressly affirm it.

As already stated, the decree of the United States court, transcript, page 116 to 133, does not attempt to enlarge or extend the description of the mortgaged property in either of the three mortgages foreclosed. On the contrary, it simply declares (mortgage of 1886, for instance, page 117) that the mortgage "is a valid and subsisting mortgage and constitutes a lien upon the mortgaged premises, property and franchises, which are described in said mortgage as follows (the words party of the first part being used to designate the said defendant, Louisville, New Albany & Chicago Railway Company)." And then follows the description quoted from the mortgage, verbatim. And so with each of the other mortgages.

But, on page 125, we find that the court actually adjudged that, so far as the question here is concerned, the description of the property in the three mortgages was identically the same, and in exact accordance with this adjudication the White Circuit Court and the Appellate Court of Indiana held in the case at bar.

The language used in the decree of the United States court adjudicating the identity of the property in the three mortgages will be quoted further along in the part of this brief discussing the merits of the case. Just how the state courts deny the authority of the United States in the federal court, when it gives to the decree of the latter court precisely the same construction that that court itself gave, counsel for plaintiff in error have not explained. So much for the question of jurisdiction.

II.

Merits.

Upon the merits of this case we have very little to add to what is said in our original brief. The contention of counsel for plaintiff in error in their brief is that, while the description in the mortgage of 1886 and the description in the mortgage of 1894 may be insufficient to cover these town lots, yet the description in the mortgage of 1890 is broader and is sufficient for that purpose.

On page five of their brief counsel for plaintiff in error say:

"The description of the property covered thereby is more comprehensive in the mortgage of 1890 than it is in either the mortgage of 1886 or 1894, the description in the mortgages last mentioned, as to future-acquired property, covering not only property acquired for railroad purposes, but covering all property of every description owned by the corporation at the date of the mortgage. The mortgage of 1890 covers all property of every nature, whether owned at the date of the mortgage or not. If the claim of plaintiff in error can not be sustained under the provisions of the mortgage of 1890 it can not be sustained under the others, and it is for this reason that we have quoted liberally from the mortgage of 1890 and have not quoted from the others."

In our original brief we have set out the parts of the various mortgages which were in the state courts relied on to support the title of plaintiff in error. As heretofore stated, in the state courts it was conceded that the description in the three mortgages was substantially the same and that whatever was included in one was included in the other. But in this court, as we have stated in our original brief, the exigencies of the case have induced

counsel for plaintiff in error to set up the claim that the description in the mortgage of 1890 is broader than that in the other two mortgages and that they may maintain their title upon that description.

In view of the fact that plaintiff in error bases its entire contention upon the decree of foreclosure in the United States court, and that its insistence is that we are denying the authority of that decree, we beg to call the attention of the court and counsel to the fact that the only adjudication or construction put upon these descriptions, taken verbatim from the mortgages by the federal court, is that the three descriptions as to this property are identical.

On page 125 of the printed transcript we find the following paragraph in the decree:

"It was also further ordered, adjudged and decreed, that the premises and property covered by said mortgage, dated January 1, 1886, and said mortgage, dated May 1, 1890, and said mortgage, dated September 1, 1894, are the same and identical with the exception that said mortgage dated January 1, 1886, covers property not covered by said other mortgages, and consisting of the right, title and interest of said Orleans, West Baden and French Lick Springs Railway Company, conveyed and mortgaged by said companies to the complainants, Farmers' Loan and Trust Company and John H. Barker, as trustees, by said conveyances, dated December 12, 1896, and with the exception that said mortgage, dated September 1, 1894, covers and is a first lien on said five parcels of railroad equipment, and said other mortgages only cover and embrace the right, title and interest of the defendant Louisville, New Albany and Chicago Railway Company in and to said five parcels of railroad equipment, subject to the lien of said mortgage, dated September 1, 1894."

That is, the United States Circuit Court, by this decree, expressly adjudges that the property covered by

each of these mortgages is identically the same, no more and no less, except that the mortgage of 1886 covers a branch, namely, the Orleans, West Baden and French Lick Springs Railway Company, and the mortgage of 1894 covers certain equipment not embraced in the others.

Who is it, then, that is questioning the verity of the decree of the United States court? That decree says that the mortgage of 1890 includes nothing that is not covered by the other two mortgages. Counsel for plaintiff in error say that the mortgage of 1890 does cover these lots, which they practically admit are not covered by the other two mortgages.

We affirm the decree; they deny it.

If anything can be plain, as shown in our original brief, it is that the mortgage of 1886 and the mortgage of 1894 include only the general "lay out" of the corporation as a railway corporation. The descriptions themselves show distinctly, as we have set forth in our original brief, that such is the fact.

Counsel for plaintiff in error have not contended, and do not in their brief contend, that those two mortgages, 1886 and 1894, cover anything else; but now, contrary to the express adjudication of the United States Circuit Court in the decree foreclosing the mortgage, they attempt to assert that the description in the mortgage of 1890 is broader than those in the other two mortgages.

We concede that if in that decree the circuit court of the United States, having the matter properly before it by averments in the bill, had adjudged that this description in the mortgage of 1890 was broader than that in the other mortgages, and had adjudged as a consequence that these lots were covered, this would have been an adjudication in favor of the contention of the plaintiff in error. But, the adjudication having been made di-

rectly the other way, in a proceeding to which the grantors of the plaintiff in error were parties, we submit that that adjudication is conclusive against the plaintiff in error.

Second. But there is another reason (suggested in our original brief), why the description in the decree does not cover these lots.

The reason why property covered by a mortgage of a railroad or other similar plant as a unit may also be sold as a unit is one of necessity and public policy.

In the first place it is impossible to describe in detail such a piece of property extending hundreds of miles, with rights of way, station grounds, etc., of varying sizes, and thousands of cars, locomotives, and all the infinite variety of personal property appurtenant to such a plant.

In the second place a dismemberment of such a property and the sale of its parts separately would destroy its value to its owners and its usefulness to the public.

Hence, whatever is a part of the "lay out" of the railroad may not only be conveyed or mortgaged, but may be sold as a unit and on a general description. But as to town lots, farming lands, or other property, not a part of the railroad, not a part of the lay out, no such reason and no such rule applies. Otherwise, an unidentified farm or town lot in Steuben county and another unidentified farm or town lot in Vanderburgh county, three hundred miles apart, might be sold under the same decree.

Nor is the fact stated, that a mortgage or deed of "all" the grantor's or mortgagor's property is held to be good, of any significance.

As suggested in our original brief, a very different rule obtains as to mortgages from that which governs decrees or judgments of courts. The mortgage "of all the property" of the mortgagor is held good, upon the

principle that that is certain which can be made certain; and it is competent for the mortgagee, in his proceeding to enforce his mortgage, to allege and particularize in detail the different pieces of property that the mortgagor owned, and that he claims are covered by his mortgage, and by proper description invoke the power of the court to make the decree apply thereto. And if the court does make a decree specifically thus describing the property, the master or the sheriff who sells the property has a description by which the same can be advertised in such a manner as to make a valid sale.

But, suppose that a mortgage is made, the only description therein being "all the property of the mortgagor," and a decree of foreclosure is taken describing the property only in the same manner, namely, as "all the property of the mortgagor," would counsel for plaintiff in error, or would any one hesitate a moment in declaring the decree to be absolutely void? Would any one claim that the master appointed to make a sale, or the sheriff designated for that purpose by the statute, could advertise and sell the property by any such description?

Or, suppose, to bring the illustration still closer, that the mortgage described certain property in sufficient detail, and then by such language as is used in this mortgage, provided that it should cover all the other property of the mortgagor wherever situate; and suppose the decree of foreclosure should be taken, the description therein being in the same terms,—is it open to question that, while the decree might be good as to the property particularly described, it would be good for nothing as to what was sought to beincluded under the general language—"all the other property of the mortgagor"?

That is the situation in the case at bar according to the plaintiff in error.

The plaintiff in error is claiming a title to these lots not merely through such a decree, but through a sale based on such decree by a master upon a notice describing the property only in such general terms,—that is, all the other property of the mortgagor.

Unless, therefore, it can be maintained that the master or the sheriff, whose duty it is to make the sale, would be invested with a roving authority to go out over the country, hear evidence and hunt up and judicially determine what property the mortgagor owned, the sale must be worthless.

With the utmost confidence it is submitted that no court ever held that by such a sale title could be acquired, and until the thing is actually done we do not believe that any court ever will hold that by such a description in a decree, notice, sale and deed, any title can be acquired.

W. H. H. MILLER,
M. WINFIELD,
Attorneys for Defendants in Error.

November 3, 1904.

IN THE

Supreme Court of the United States.

No. 336.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, *Plaintiff in Error*,

v.

PATRICK MCGUIRE *et al.*, *Defendants in Error*.

PARTIAL TRANSCRIPT OF RECORD.

(Complaint.)

STATE OF INDIANA, } ss:
PULASKI COUNTY, }

In Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS & LOUISVILLE R. R. Co.

v.

PATRICK MCGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana.*

The plaintiff complains of the defendants and says that it is the owner in fee simple of the following de-

scribed real estate situated in the county of Pulaski and state of Indiana, to wit:

A piece or tract of land beginning at the southwest corner of Yellow and Bill streets, in the town or village of Francesville, Pulaski county, Indiana, thence south along the west line of said Bill street to the north line of Sherman avenue, thence west with said north line of Sherman avenue a distance of one hundred and fifty feet (150 feet), thence north parallel with said west line of Bill street, to the south line of Yellow street, thence east with the south line of Yellow street a distance of one hundred and fifty (150) feet to the place of beginning.

Said piece or parcel of land being the same described in a certain plat dedicated by one Allison in March, 1862, and acknowledged and recorded in the office of the recorder of Pulaski county, Indiana, April 8, 1862.

That the defendants set up and assert some title, claim or interest in the said described real estate which constitutes a cloud upon plaintiffs title, and the plaintiff prays a decree quieting its said title, and that the defendants be enjoined from setting up or asserting any title, claim or interest therein.

FIELD & NYE,
and GEO. W. KRETZINGER,
Attorneys for Plaintiff.

(Answer.)

STATE OF INDIANA,
COUNTY OF PULASKI, } ss:

In the Pulaski Circuit Court, January Term, 1898.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY

v.

PATRICK McGUIRE AND M. M. HATHAWAY.

Defendants and for answer to the first paragraph of plaintiff's amended complaint say, that they deny that the plaintiff is the owner and denies that it has any interest whatever in the following described parts and portions of the lands described in the plaintiff's complaint, to wit: Commencing at the northwest corner of lot No. twelve (12), in block No. nine (9), in the town of Francesville, in Pulaski county, Indiana, thence west, parallel with Yellow street in said town, 50 feet to a post on the west line of Bill street at the place of beginning; thence west, parallel with the south line of Yellow street to a post at the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of said right of way, 190 feet to a post, thence east parallel with the south line of Yellow street, 150 feet to the west line of Bill street, thence north with the west line of Bill street, 190 feet to the place of beginning.

Also commencing with the southwest corner of lot No. seven (7), in block No. nine (9), in said town, thence west with the north line of Montgomery street to the west line of Bill street to a post at the place of be-

ginning; thence west with the north line of said Montgomery street to a post five (5) feet east of the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence north parallel with the east line of said right of way sixty-six (66) feet to a post, thence east parallel with the north line of said Montgomery street to the west line of Bill street, thence south with sixty-six (66) feet to the place of beginning.

Commencing at the northwest corner of lot No. twelve (12), in block No. fourteen (14), in said town, thence west with the south line of Montgomery street to the west line of Bill street to a post at the place of beginning; thence west with the south line of Montgomery street to a post at a point thirty (30) feet east of the east line of right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south parallel with the east line of said right of way three hundred and sixty (360) feet to the north line of James street to the west line of Bill street, thence north with the west line of Bill street three hundred and sixty (360) feet to the south line of Montgomery street to the place of beginning.

Also: Commencing at the northwest corner of lot No. twelve (12), in block No. twenty-two (22), in said town, thence west with the south line of James street to the west line of Bill street to a post at the place of beginning; thence west with the south line of James street to the east line of the right of way of what was formerly known as the Louisville, New Albany and Chicago Railway Company, thence south with the east line of the said right of way three hundred and sixty (360) feet to the north line of Lyman avenue, thence east with the north line of Lyman avenue to the west line of Bill street three hundred and sixty (360) feet

to the south line of James street to the place of beginning.

All of the above described lands being in the town of Francesville, in Pulaski county, in the state of Indiana.

And as to such land above described the defendants deny each and every allegation contained in the plaintiff's amended complaint. And as to the remaining portions of said lands described in the plaintiff's amended complaint, these defendants admit that the plaintiff is the owner thereof, and these defendants hereby expressly disclaim all interest therein or any claims thereto whatever.

M. WINFIELD,
and STEIS & HATHAWAY,
and CHARLES C. SPENCER,
Attorneys for Defendants.

(Trial.)

There was a trial by jury on this first paragraph of complaint and the above answer.

"The issues being joined between the parties, the defendants now move the court that this cause be tried by a jury, which motion is sustained by the court, to which ruling of the court the plaintiff excepts and is given ten days in which to file its bill of exceptions.

"And afterwards, to wit: On the 19th day of May, 1899, being the 23d judicial day of the said April Term, 1899, of said White Circuit Court, present the said special judge, James V. Kent, and the other officers as heretofore, the following further proceedings were had in the case of

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY

v.

PATRICK MCGUIRE, M. M. HATHAWAY AND PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana.*

Come again the parties, in person and by their attorneys, and comes also the jury, and the testimony being closed the court now directs the jury to return a verdict for the defendants herein, and accordingly the jury now returns their verdict for the defendants, reading as follows:

STATE OF INDIANA, WHITE COUNTY, } ss:

In the White Circuit Court, April Term, 1899.

(Verdict.)

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAIL AY COMPANY

v.

PATRICK MCGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana.*

We the jury find for the defendants.

JAMES P. FOLTZ, Foreman.

and thereupon the plaintiff files its motion for a new trial which motion is in these words.

STATE OF INDIANA, } ss: (Motion for New Trial.)
WHITE COUNTY, }

In the White Circuit Court, April Term, 1899.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY

v.

PATRICK MCGUIRE, M. M. HATHAWAY, PHILLIP DELLINGER, *Sheriff Pulaski County.*

The plaintiff herein moves the court for a new trial in said cause upon the following grounds, to wit:

1st. Because the court erred in directing the jury to return a verdict for the defendants.

2d. Because the court erred in striking out the 2d paragraph of plaintiff's amended complaint.

3d. Because the court erred in ordering the plaintiff to make its second paragraph of amended complaint more specific.

4th. Because the verdict of the jury is contrary to the evidence.

5th. Because the verdict of the jury is contrary to law.

6th. Because the verdict of the jury is not supported by sufficient evidence.

7th. Because the court erred in refusing to permit the plaintiff to introduce and read in evidence the town plat of the town of Francesville, made and executed by one Allison in 1862, recorded in the recorder's office of Pulaski county.

8th. Because the court erred in permitting the defendants, over the objection and exception of the plaintiff, to read in evidence the return of the sheriff on the execution issued upon the judgment of the de-

fendant McGuire against the Louisville, New Albany and Chicago Railway Company.

9th. Because the court erred in permitting the defendants to read in evidence, over plaintiff's objection and exception, the deed by the Sheriff Dellinger to the defendant Hathaway on the execution issued upon the judgment of the defendant McGuire against the Louisville, New Albany and Chicago Railway Company.

10th. Because the court erred in refusing to strike out said sheriff's deed from the evidence in said cause on plaintiff's motion.

11th. Because the court erred in permitting the witness Hathaway to testify, over the objection and exception of the plaintiff, to the occupancy and use of the grounds in controversy by various persons prior to February 20, 1896.

12th. Because the court erred in permitting the witness Hathaway to testify, over the objections and exceptions of the plaintiff, to the use and occupancy of the land in controversy after February 20, 1896.

13th. Because the court erred in refusing the offered testimony of the witness Petre as to the amount and payment of taxes to the town of Francesville on the land in controversy for town purposes and for street improvements for the years 1891 to 1898 inclusive, as the same appeared on the tax duplicate of said town of Francesville.

Whereupon plaintiff prays a new trial.

GEO. W. KRETZINGER,
E. C. FIELD,
Attorneys for Plaintiff.

(Motion Overruled.)

And the court being advised, overrules plaintiff's said motion for a new trial, to which ruling of the court the plaintiff at the time excepts, and thereupon the defendants' attorneys move the court for judgment upon the verdict of the jury, which motion is sustained by the court.

(Judgment.)

It is therefore adjudged and decreed by the court that the plaintiff take nothing by its cause of action, and that the defendants recover of and from the plaintiff their costs in this behalf expended.

(Appeal.)

Whereupon the plaintiff prays an appeal to the supreme court of Indiana, which is granted by the court, and the plaintiff is given sixty days in which to make and file its bill of exceptions herein, and the plaintiff is given thirty days in which to file its appeal bond herein in the sum of five hundred dollars, with James Murdock as surety thereon, which surety is approved by the court.

(Assignment of Errors.)

In the Supreme Court of Indiana.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, *Appellant*,
v.
PATRICK MCGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana*, *Appellees*.

Assignment of Errors.

The appellant avers that there is manifest error in the judgment and proceedings in this cause, in this:

First. The court erred in sustaining the appellees' motion for a new trial as of right.

Second. The court erred in directing the jury to return a verdict in favor of appellees.

Third. The court erred in ordering appellant to make its second paragraph of amended complaint more specific.

Fourth. The court erred in striking out the second paragraph of appellant's amended complaint.

Fifth. The court erred in overruling appellant's motion for a new trial.

Wherefore appellant prays that the judgment be reversed.

E. C. FIELD,
G. W. KRETZINGER,
W. S. KINNAN,
and SELLERS & UHL,
Attorneys for Appellant.

(The law as to the jurisdiction of the Indiana courts for the hearing of appeals having been changed this case was transferred from the Supreme to the Appellate court.)

(Opinion.)

Appellate Court of Indiana, Division No. 1.

Jan. 7, 1903.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY
v.
PATRICK MCGUIRE *et al.*
} Appeal from Circuit Court of White County.

HENLEY, J. This was an action commenced by appellant to quiet its title to a certain parcel of land sit-

uated in Pulaski county, Ind. The cause was tried by a jury. After the evidence was concluded the trial judge instructed the jury to return a verdict for appellees. The question presented here arises upon the motion for a new trial, and questions the action of the trial court in so instructing the jury. The facts upon which the instruction was based are not in dispute. Both appellant and appellees claim title through the Louisville, New Albany & Chicago Railway Company. Appellant claims title through certain mortgages given by the Louisville, New Albany & Chicago Railway Company which were foreclosed in the United States Circuit Court for the District of Indiana, and through which foreclosure, and other conveyances following it, its title became vested. Appellees' title is claimed as follows: On the 24th day of September, 1896, the appellee, Patrick McGuire, recovered judgment in the White circuit court of Indiana against the Louisville, New Albany & Chicago Railway Company for $2,416.23 and costs. On the 16th day of October, 1897, the said McGuire caused an execution to be issued by the clerk of the White circuit court to the sheriff of Pulaski county. On the 18th day of October, 1897, the said sheriff levied the execution upon the real estate in dispute. On the 13th day of November, 1897, the sheriff sold this real estate at public sale, and the appellee, Hathaway, became its purchaser, and on the 23d day of November, 1898, the sheriff of Pulaski county executed to him a deed. A transcript of the McGuire judgment had been filed in the Pulaski circuit court on the 28th of January, 1897.

It is contended by appellant that the real estate in controversy is a part of its depot grounds at Francesville, Ind., and that the foreclosure and sale of the

property of the Louisville, New Albany and Chicago Railway Company, through which foreclosure and sale appellant obtained whatever title it may have in the disputed premises, carried with it the title to said disputed premises. The judgment of McGuire against the Louisville, New Albany and Chicago Railway Company was obtained after the execution of the foreclosed mortgages through which appellant claims title. The contention of counsel for appellees is that the disputed property was not embraced within the mortgages and foreclosure, and that the same was not covered by the clause in each mortgage intended to cover after-acquired property, and therefore could not have been embraced within the foreclosure and sale under the proceedings in the United States Court. An abstract question of law is therefore presented, as to whether or not the property in dispute passed by the foreclosure and sale. There were three mortgages executed by the Louisville, New Albany and Chicago Railway Company—one in 1886, one in 1890, and one in 1894; all being prior to the rendition of the McGuire judgment. In the mortgage of 1886 the description of after-acquired property is as follows: "Which may at any time hereafter during the continuance of this trust be acquired by the said railroad company for purposes connected with or appertaining to the railroad or railways above mentioned or described."

The description of the after-acquired property in the mortgage executed in 1890 was in the following words: "And all that it may in the future add, construct, or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described." The description of the after-acquired property in the mortgage executed in 1894 was in the following words: "What may at any time

before or after the date of this indenture be acquired by or for the said railway company for purposes connected with or appertaining to said railroads or railways hereby conveyed.'' The decree directing the sale of the Louisville, New Albany and Chicago Railway Company follows the description in the mortgage. The master's deed conveying the property does not vary the description as to after-acquired property. The property in dispute was properly acquired by the Louisville, New Albany and Chicago Railway Company after the execution of the above described mortgages. The trial court determined that the undisputed evidence established that the land levied upon and sold to satisfy appellee's judgment was not used by appellant for railroad purposes; that it was not needed for such purposes, and that it was not properly a part of the ''lay-out'' of the road; and that therefore the clauses in the mortgages covering after-acquired property did not cover the property in dispute. The evidence shows that the particular parcel of land in dispute has never been used by the railroad company for railroad purposes; that, while it is contiguous to and adjacent to the depot grounds of appellant, it has buildings located upon it which have been leased to different parties, and occupied and used as a barber shop, grocery, postoffice, and in other ways entirely foreign to the necessary means of operating the railroad.

In speaking of the property covered by the after-acquired clause in a mortgage given by a railroad company, Mr. Short, in his excellent work on the Law of Railway Bonds and Mortgages, at section 209, says: ''The lien will be confined to the lands which were prospectively necessary and convenient for the construction and future operation of the road, and will

not embrace lands situated outside of the 'lay out' of the road, which had been taken over by the company in order to acquire at a less cost the land actually needed for the line itself." A case very similar to the one under consideration is the case of *Seymour* v. *Railroad Co.*, 25 Barb. 284. It involved a controversy between the judgment creditors and the purchaser of railroad property at foreclosure sale, and in that case it was squarely held that all lands acquired by the railroad company after the execution of the mortgage which were not used for railroad purposes were not covered by the lien of the mortgage, and did not pass by the foreclosure and sale to the purchaser, but were subject to a lien of the judgment creditors. The court, in that case, at page 312, said: "It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes; that in some instances whole lots were purchased to secure a right of way across them. If the railroad company, for this purpose, had purchased a lot of 10 or 100 acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or for other legitimate purposes, the lien of the defendants' judgment must prevail." To the same effect, see *Railroad Co.* v. *Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66; *Railroad Co.* v. *Coffin*, 50 Conn. 150; *Mississippi Val. Co.* v. *Chicago, St. L. & N. O. R. Co.*, 58 Miss. 896; *Eldridge* v. *Smith*, 34 Vt. 484; *Shirley* v. *Railway Co.*, 78 Tex. 136, 10 S. W. 543; *Railroad Co.* v. *Parker*, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66; *Humphreys* v. *McKissock*, 140 U. S.

304, 11 Sup. Ct. 1022, 35 L. ed. 395; *Dinsmore* v. *Railroad Co.*, 12 Wis. 725; *Farmers' Loan and Trust Co.* v. *Commercial Bank*, 11 Wis. 207; *Walsh* v. *Barton*, 24 Ohio St. 28.

We think the trial court was right in instructing the jury, upon the evidence submitted, to return a verdict for appellees. Judgment affirmed.

Following the adverse decision the appellant in the state court, on March 7, 1903, filed its petition for a rehearing, in which it stated the following points of alleged error:

(Petition for Rehearing.)

"I.

"The court erred in holding that the property in dispute was property acquired by the L., N. A. & C. Co. after the execution of the mortgages upon which appellant's title is based.

"II.

"The court erred in holding that the several mortgages upon which appellant's title is based, as to future-acquired property, limited the lien to property acquired for railway purposes.

"III.

"The court erred in holding that the lien of these several mortgages did not attach to after-acquired property unless it was used for railway purposes.

"IV.

"The court erred in failing to decide whether the second paragraph of complaint was sufficient.

"V.

"The court erred in holding that the jury was properly instructed to find for the appellees.

"VI.

"The court erred in failing to decide whether the offered plat was valid or was proper evidence.

"VII.

"The court erred in failing to decide whether this plat was proper evidence in connection with the Brooks deed, made to confirm it.

"VIII.

"The court erred in failing to decide whether appellant could prove payment of taxes and other acts of possession in order to show that it, in fact, had title when these mortgages were made.

"IX.

"The court erred in not reversing the judgment of the lower court.

"Wherefore the appellant prays a rehearing and all proper relief. Respectfully submitted,

"E. C. FIELD,
"G. W. KRETZINGER,
"H. R. KURRIE,
"*Attorneys for Appellant.*"

February 28, 1903.

This petition for a rehearing having been overruled, the appellant below, plaintiff in error here, filed in the supreme court its petition for the transfer of the cause to the supreme court under subdivision 2, of section 1337j, R. S. 1901, and as grounds for such transfer stated the following:

"I.

"The appellate court held that it was shown without dispute that the property in controversy was not used for railway purposes; that it was after acquired, and on this account was not within the description in the mortgages upon which appellant's title is based. This was error. The court thereby refused to give due effect to the judgment of the federal court.

"II.

"While it is not so stated in so many words, yet the appellate court must have held that the evidence offered, but excluded, by which it was intended to prove title at the date of the several mortgages, and bring the tract within the 'then owned' clause was properly excluded. This was error."

This petition was also denied.

And thereupon this writ of error was sued out.

IN THE APPELLATE COURT OF THE STATE OF INDIANA.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY	
v.	No. 3780.
PATRICK MCGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana.*	

To any Justice of the Supreme Court of the United States, or the Chief Judge of the Appellate Court and Presiding Judge of Division No. 1 of said Court of the State of Indiana.

Petitioner, The Chicago, Indianapolis & Louisville Railway Company, respectfully represents that on or about the 8th day of November, 1897, the Chicago, Indianapolis and Louisville Railway Company commenced a suit in the circuit court of Pulaski county, Indiana, against the defendants, Patrick McGuire, M. M. Hathaway, and Phillip Dellinger, sheriff of Pulaski county, Indiana, to quiet its title to certain lands and premises situated in the county of Pulaski, in the state of Indiana, particularly described in plaintiff's petition in said suit; and afterwards in response to process served upon them, the said McGuire, Hathaway and Dellinger, appeared and interposed among others the defense hereinafter mentioned in said action, and upon the trial of said cause in due course judgment was rendered by said circuit court in favor of said defendants. From the judgment so rendered by said circuit court, the said Chicago, Indianapolis and Louisville Railway Company appealed to the appellate court of the state of Indiana, where said

cause upon appeal was numbered and entitled as above; and afterwards, on, to wit, the 7th day of January, 1903, division No. 1 of said appellate court of Indiana rendered judgment whereby it affirmed the judgment of said circuit court, and rendered judgment in favor of said McGuire, Hathaway and Dellinger, and against said Chicago, Indianapolis and Louisville Railway Company, for all lands involved in said suit.

Afterward, and in due time, said Chicago, Indianapolis & Louisville Railway Company, filed, in said appellate court of Indiana, its petition for a rehearing in said cause, and brief in support thereof, which was thereafter, to wit, on the first day of April, 1903, by said court overruled and denied. Thereafter, and in due time, said Chicago, Indianapolis & Louisville Railway Company applied in due form and as authorized by law, to the supreme court of the state of Indiana, for a transfer of said cause, or a writ of error in said cause to said appellate court of Indiana, upon the ground and under the facts hereinafter mentioned, which application was thereafter, to wit, on the thirteenth day of May, 1903, by said supreme court denied, and the transfer of said cause and said writ so prayed for were refused; whereupon, the said judgment of the said appellate court of Indiana, which is the highest court of the state of Indiana in which a decision in said suit could be had, became and is now final.

Petitioner says that it is aggrieved by the said judgment of division No. 1 of the appellate court of Indiana, and the proceedings in said suit, and that in said judgment and proceedings had prior thereto in said cause, errors were committed to the prejudice of the petitioner, because it says there was in said

suit drawn in question the validity of a statute and an authority exercised under the United States, and the decision in said suit was against their validity, and there was drawn in question the validity of a statute, or a constitution of, or an authority exercised under a state [statute], on the ground of their being repugnant to the constitution, or laws of the United States, and the decision in said suit was in favor of their validity, and that titles, rights, privileges and immunities were in said suit claimed by petitioner under the constitution and statutes of, and commissions held, and authority exercised under, the United States, and the decision in said court was against the titles, rights, privileges and immunities specially set up and claimed therein by petitioner under such constitution, statutes, commissions and authorities, as will hereinafter more fully appear.

Petitioner says that upon the trial of said cause in said circuit court, the Chicago, Indianapolis and Louisville Railway Company, the plaintiff therein, introduced in evidence a decree of the circuit court of the United States, in and for the district of Indiana, rendered January 23, 1897, foreclosing three certain mortgages executed by the Louisville, New Albany and Chicago Railway Company, under whom the defendants in said suit claimed, one of said mortgages being executed to the Central Trust Company of New York, and James Murdock, as trustee; one of said mortgages being executed to the Farmers' Loan and Trust Company, and John H. Baker, as trustee, and one of said mortgages being executed to the Central Trust Company of New York, and John H. Stotsenberg, as trustee, and ordering the sale of the property embraced in said mortgages; and also introduced other decrees and proceedings of said circuit court of the

United States and its officers, showing sale of said mortgaged property pursuant to said foreclosure decree and specially set up and claimed at the time that said decree and proceedings in said circuit court of the United States embraced the property involved in this suit, and were effectual to vest the title to the same in those under whom the said Chicago, Indianapolis and Louisville Railway Company claimed; and afterward, at the trial of said cause the court instructed the jury therein to return a verdict in favor of the said defendants and against the plaintiff, the petitioner herein, and to the said action and decision of the said court, the said Chicago, Indianapolis and Louisville Railway Company duly excepted, and upon its appeal to the said appellate court duly assigned such ruling of said circuit court as error, as shown by its assignment of error originally numbered 2 and 5; but said division of said appellate court overruled and refused to sustain said assignment of error, and confirmed such action of said circuit court.

Petitioner further says that at the trial of the said cause, and for the purpose of proving that the real estate described in its complaint therein was owned by the said Louisville, New Albany and Chicago Railway Company at the time of the execution of each of said several mortgages above mentioned, and was covered by and included in the said mortgages under that part of the descriptions therein which covered all property of any nature owned by the mortgagor at the time the said mortgages were made, and for the purpose of proving that said property was included in the decree of the said United States circuit court foreclosing said mortgage, where the said decree directed the sale of all property owned by the mortgagor company at the date of the execution of

said several mortgages; and for the purpose of showing that by the sale of said property and execution of deeds by the receiver and special master making the sale and the orders and decrees of the said court subsequent to said decree, the said Chicago, Indianapolis and Louisville Railway Company offered in evidence a plat of the town of Francesville, Indiana, in which said town the said real estate in controversy is situated, executed in 1862 by one Allison, which had been duly recorded, by which said plat the real estate became and was dedicated to the said railway company.

And for the same purpose the said plaintiff company offered to prove its possession of said property and the payment of taxes thereon since said time.

And for the same purpose the said plaintiff company offered in evidence the said plat in connection with a deed for the said real estate recognizing the existence of said plat, which deed was executed by one Brooks and his wife, conceded to be the sole heirs surviving of the owner of said real estate at the time said plat was executed.

The court refused to permit the plaintiff to introduce said plat in evidence; the court refused to permit said plaintiff to prove possession of said real estate since possession of said plat; the court refused to permit the plaintiff to prove the payment of taxes or special assessments assessed against said real estate since the date of said plat, and there was no evidence admitted at the trial of said cause in lieu of such evidence so excluded, or which proved the facts which would have been shown if such evidence had been admitted. To the action and decision of said circuit court in excluding said several items of evidence and in excluding each of them separately and severally,

the said Chicago, Indianapolis and Louisville Railway Company duly excepted, and upon appeal to the said appellate court duly assigned said ruling of said circuit court as error, as shown by the assignment of error originally numbered 2 and 5. But said division No. 1 of the appellate court overruled and refused to sustain said assignment of error and affirmed said action of said circuit court.

Before the trial of said cause the said Chicago, Indianapolis and Louisville Railway Company filed its amended complaint in two paragraphs. In the first paragraph of its said amended complaint the said plaintiff company set up and claimed title to said real estate in controversy in fee simple, and charged that the defendants claimed an interest therein adverse to the title of the plaintiff; that such claim was unfounded, and constituted a cloud on the title of the plaintiff. In the second paragraph of said amended complaint the said plaintiff company charged that it was the owner of an easement in the said real estate. The said paragraph specifically averred the dedication of said property by said plat, and in detail told of the transfer thereof from the then existing corporation owning the same to the said Louisville, New Albany and Chicago Railway Company, and afterwards said company, by force of the decree of the United States Court for the District of Indiana, vested said title in the persons through whom by deed the petitioning company herein claims title to such interest in such property; that the said circuit court, upon the motion of the said defendants, held that said paragraph of complaint was insufficient to show title in this plaintiff to the said property therein described, or any part of it, and directed that said paragraph be made more specific. Whereupon the said plaintiff, believing that

the said paragraph fully and sufficiently showed title to said easement in the petitioner herein by virtue of said plat and said decrees, refused to amend its said paragraph, and because of such refusal the defendants were not required to answer it, and no issue was made upon said paragraph of complaint, and the rights therein averred were denied to the petitioner; that the said petitioner, the Chicago, Indianapolis and Louisville Railway Company, duly excepted to the said ruling of the said circuit court, and upon its appeal to the said appellate court duly assigned such ruling of said circuit court as error, as shown by its assignment of error originally numbered 3 and 4. But said division of said appellate court overruled and refused to sustain said assignment of error, and affirmed such action of said circuit court.

Petitioner further says that each of the rulings above mentioned and complained of with others were duly assigned as error in the application made as aforesaid by the said Chicago, Indianapolis and Louisville Railway Company to the supreme court of the state of Indiana for writ of error or transfer of said cause to it, but the same with the said application for a writ of error or transfer were overruled and denied by said supreme court.

Petitioner refers to the record of said cause, as filed in said appellate court, for further and more complete statements of the rulings and proceedings complained of, and the facts that specially set up and claimed the benefit of the decree aforesaid of said circuit court of the United States, and of the proceedings thereunder, and for the manner in which such claims were set up and made. And petitioner says that in the proceedings above mentioned in said cause, they specially set up and claimed title, rights, privileges and im-

munities, under the constitution and statutes of, and commission held and authorities exercised under, the United States, and the decision of said circuit court and of the said division of said appellate court, and of the said supreme court of the state of Indiana, were against the titles, rights, privileges and immunities, specially set up and claimed by the petitioner, The Chicago, Indianapolis and Louisville Railway Company, in said cause.

Petitioner refers to the assignment of errors filed herewith and prays that the same may be considered for the purposes of this application as a part hereof, and further prays that a writ of error may be allowed and issued herein to the said appellate court in and for Indiana, which now has the record in said cause, for the removal of said cause to the supreme court of the United States, to the end that the error in said judgment and the proceedings in said cause may be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, and that the transcript of the record, proceedings and papers in said cause duly authenticated, may be sent to said supreme court.

E. C. FIELD,
G. W. KRETZINGER,
H. R. KURRIE,
Attorneys for the Chicago, Indianapolis and Louisville Railway Company.

Allowed this 23d day of May, 1903.

FRANK S. ROBY,
Chief Judge of the Appellate Court of Indiana.

JAMES B. BLACK,
Presiding Judge Division No. 1 of the Appellate Court of Indiana.

ENDORSED: In the Appellate Court of Indiana. The Chicago, Indianapolis and Louisville Railway Co. *vs.* Patrick McGuire *et al.* Petition for Writ of Error. Filed May 23, 1903. R. A. BROWN, *Clerk.*

IN THE APPELLATE COURT OF THE STATE OF INDIANA.

Division No. 1.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY

v.

PATRICK McGUIRE, M. M. HATHAWAY, AND PHILLIP DELLINGER, *Sheriff of Pulaski County, Indiana.*

No. 3780.

ASSIGNMENT OF ERROR.

Now comes plaintiff in error in the above entitled cause, The Chicago, Indianapolis and Louisville Railway Company, and on writ of error from the supreme court of the United States says that in the record and proceedings in said cause there is manifest error.

1st. Plaintiff offered and the court admitted in evidence on behalf of plaintiff, the foreclosure proceedings had in the circuit court of the United States and district of Indiana, the decree of foreclosure and sale entered in said proceedings by that court, and the deeds made pursuant to said decree, under which plaintiff in error became the owner of the property involved in the above entitled suit. That the trial

court and appellate court wholly disregarded the force and effect of said foreclosure decree and such evidence made thereunder and pursuant thereto.

2d. That said state courts wholly failed and refused to give full force and effect to said foreclosure decree so entered by the circuit court of the United States as aforesaid, and wholly failed and refused to give any force or effect whatever to the proceedings had under said decree and in the enforcement thereof; in this, that the railroad mortgages foreclosed by said decree in said circuit court of the United States covered and included in its description of the property therein conveyed the real estate here involved, and the decree foreclosing said mortgages so included in the description of the property covered by said mortgages and to be sold in satisfaction thereof, the piece of real estate here involved, notwithstanding which the said state courts wholly failed and refused to give such effect thereto.

3d. That for the purpose of more fully showing that the real estate here involved was owned by the railroad mortgagor at the time of the execution of the mortgages so foreclosed as aforesaid, plaintiff in error offered in evidence on the trial of this cause in the trial court of said state, a plat of the town of Francesville, executed in 1862, by one Allison, which plat had been duly recorded, it appearing that such plat was both executed and recorded long prior to the execution of said foreclosed mortgages, and also offered evidence showing that the mortgagor of said railroad mortgages so foreclosed as aforesaid, had been in possession of and had paid taxes upon said property from the date of the donation of the land here involved to said mortgagor, which donation was made and shown upon said plat from the date of said plat and

its recording down to the institution of the foreclosure proceedings aforesaid, in the circuit court of the United States for the district of Indiana, said proceedings to foreclose having been instituted in said court on the 12th day of November, 1896, which refusal plaintiff in error here assigns for error.

4th. That through said foreclosure proceedings, decree and sale, so entered and had in and through said circuit court of the United States for the district of Indiana, plaintiff in error became the lawful owner of the real estate here involved, and the judgment of the state courts divesting the title of plaintiff in error thereto, constitute a refusal on the part of said state courts to recognize or to give full lawful force and effect to said proceedings, foreclosure decree and conveyances, in and through said federal court, contrary to the constitution and laws of the United States.

Wherefore, said plaintiff in error prays that the judgment of said courts of the state of Indiana, be reversed, and said *courts* [cause] remanded for such further proceedings as the constitution and laws of the United States may require.

G. W. KRETZINGER,
E. C. FIELD,
H. R. KURRIE,
Attorneys for Plaintiff in Error.

ENDORSED: In the Appellate Court of Indiana. The Chicago, Indianapolis and Louisville Railway Co. *vs.* Patrick McGuire *et al.* Assignment of Errors on Writ of Error. Filed May 23, 1903. R. A. Brown, *Clerk.*

IN THE SUPREME COURT OF THE UNITED STATES.

CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

v.

PATRICK MCGUIRE *et al.*,
Defendants in Error.

Cause No. 336.

In the above entitled cause the undersigned, attorneys for the petitioner in error and defendants in error in the above cause, agree that the two pages attached to this stipulation contain a true and correct copy of the proceedings had in the supreme court of Indiana in the above cause, and the certificate of the clerk of said court with reference thereto. We further agree that the Honorable James H. McKenney, clerk of the supreme court of the United States, may attach to the transcript of the record now on file in said court in said cause, the said two pages, as a part of said record before it is printed, and print the same as a part thereof as if said pages had been attached to said transcript as the last pages thereof before it was filed in said court.

E. C. FIELD,
Attorney for Plaintiff in Error.
W. H. H. MILLER,
Attorney for Defendant in Error.

And afterward, to wit: On April 25, 1903, comes the appellant, by counsel, and files its petition to transfer the above entitled cause to the supreme court for decision.

And afterward, to wit: On April 28, 1903, come the appellees, by counsel, and file their answer to appellant's petition to transfer the above entitled cause to the supreme court for decision.

And afterward, to wit: On May 14, 1903, the same being the 148th judicial day of the November term, 1902, of said court, come the parties, by counsel, and the supreme court, being advised in the premises, denies appellant's petition to transfer the above entitled cause to that court for decision.

STATE OF INDIANA, }
SUPREME COURT. }

I, Robert A. Brown, clerk of the supreme court, and *ex officio* clerk of the appellate court in and for the state of Indiana, certify that the above and foregoing is a full, true and complete copy of the proceedings in the supreme court in cause No. 3,780, *Chicago, Indianapolis and Louisville Railway Company* v. *Patrick McGuire et al.*, as appears from the original entries on the dockets of the said supreme court.

IN WITNESS WHEREOF I hereto set my hand and affix the seal of said supreme court, at the city of Indianapolis, Indiana, this 7th day of July, 1903.

(Signed) ROBERT A. BROWN,

[SEAL] *Clerk Supreme Court of Indiana.*

Supreme Court of the United States.

No. 69.—October Term, 1904.

The Chicago, Indianapolis and Louisville Railway Company, Plaintiff in Error, vs. Patrick McGuire et al. } In error to the Appellate Court of the State of Indiana.

[January 3, 1905.]

This was a suit in the nature of a bill in equity instituted in the Circuit Court for Pulaski County, by the railroad company, to quiet its title to certain land, and for an injunction. The case was tried before a jury and a verdict returned for the defendants, under instruction of the court.

Both parties claimed title through the Louisville, New Albany and Chicago Railway Company—plaintiff in error, which was also plaintiff below, through certain mortgages given by the New Albany Company in 1886, 1890 and 1894, which were foreclosed in the United States Circuit Court, and through which foreclosure and subsequent sale its title became vested—defendants, through a judgment recovered by McGuire September 24, 1896, in the Circuit Court of White County, against the New Albany Company for $2,416.30, upon which an execution was issued October 16, 1897, to the sheriff of Pulaski County, and a levy made upon the real estate in dispute. A sale was made November 13, 1897, to the defendant Hathaway, to whom a deed was executed by the sheriff November 23, 1898.

It was insisted by the plaintiff railroad company that the property in controversy was a part of the ground appurtenant to its station at Francesville, Indiana, and that the foreclosure and sale of the property of the New Albany road, through which it obtained its title, carried with it the title to the premises in dispute. The judgment of McGuire was obtained after the execution of the mortgages through which the plaintiff claimed its title. Defendants insisted that the disputed property was not embraced within the mortgages under the after-acquired property clause inserted therein, because entirely foreign to the operation of the railroad, and therefore could not have been embraced within the foreclosure and sale.

The Appellate Court of Indiana sustained their contention, held that the trial court was right in instructing the jury to return a verdict for the appellees, and affirmed its judgment. (31 Ind. App. Ct. 110.) The Supreme Court denied a petition for review.

Mr. Justice Brown delivered the opinion of the Court.

Motion is made to dismiss this writ of error upon two grounds: (1) That the supposed Federal question was not set up and claimed until too late. (2) That there is no Federal question in the case.

The motion must be sustained upon the first ground. The Federal question now put forward by the plaintiff is that the Appellate Court failed to give full faith and credit to the foreclosure decree made by the Circuit Court of the United States and the sale in pursuance thereof, in refusing to hold that the mortgages foreclosed by said decree covered and included in their description of the property therein conveyed the real estate in controversy. This question, however, never seems to have been presented either to the court of first instance or to the court of appellate jurisdiction. It is true the question was argued at length as to what was intended to be covered by the description in the mortgages and by the foreclosure and sale, but the Federal character of this question was not indicated until after a petition for a rehearing in the Appellate Court had been overruled. Plaintiff then filed in the Supreme Court of the State a petition for the transfer of the cause to that court, and, as grounds for such transfer, insisted that the Appellate Court erred in holding that the property in controversy was after-acquired property, not used for railway purposes, and on this account was not within the mortgages upon which appellant's title was based, and that the court thereby "refused to give due effect to the judgment of the Federal court."

This petition appears to have been denied by the Supreme Court without an opinion. Doubtless, if that court had proceeded to pass upon this as a Federal question we should have held it sufficient, but it will be observed that the petition contained a mere suggestion of a violation of a Federal right, not the distinct presentation of a Federal question, and that no reference was made to the Constitution of the United States. (*Oxley Stave Co.* v. *Butler Co.*, 166 U. S. 648.) We are left to infer that the petition was denied because the point of constitutionality was not made in either of the courts below. The rule seems to be settled in Indiana, as in many other States, that the matter assigned in the Supreme Court of the State as error must have been properly presented in the court below and there adjudicated. (*Coleman* v. *Dobbins*, 8 Ind. 156–164; *Priddy* v. *Dodd*, 4 Ind. 84; *Wesley* v. *Milford*, 41 Ind. 415; *Selking* v. *Jones*, 52 Ind. 409; *Russell* v. *Harrison*, 49 Ind. 97.) This is also the practice in this court. (*Cornell* v. *Green*, 163 U. S. 75–80; *Ansbro* v. *United States*, 159 U. S. 695; *Pine River Logging Co.* v. *United States*, 186 U. S. 279–289.) If the Supreme Court did in fact consider the Federal question the burden was upon the plaintiff to show it. There is no presumption that the court considered such question. Under such circumstances we decline to review the constitutional question here. This was expressly held in *Jacobi* v. *Alabama*, (187 U. S. 133;) *Layton* v. *Missouri*, (187 U. S. 356;) *Spies* v. *Illinois*, (123 U. S. 131.)

True, the Federal question was set up at length in the petition filed in the Appellate Court for a writ of error from this court, but that was clearly

too late. (*Fowler* v. *Lamson*, 164 U. S. 252; *Missouri Pacific Co.* v. *Fitzgerald*, 160 U. S. 566, 575; *Ansboro* v. *United States*, 159 U. S. 695..)

In this connection the plaintiff in error urges upon us the proposition that, as it relied solely upon a title derived by a foreclosure and sale in a Federal court, the State court must necessarily have considered and decided that question, and that in such cases the Federal Constitution need not be specially set up and claimed. This argument would necessarily not apply to the Supreme Court of the State, which, as above indicated, might have held and probably did hold that the Federal question, not having been suggested in the court below, could not be made available on appeal. The Appellate Court did not discuss it. There are doubtless a few cases which hold that, where the validity of a treaty or statute or authority of the United States is raised, and the decision is against it, or the validity of a State statute is drawn in question, and the decision is in favor of its validity, and the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, the fact that it was not specifically set up and claimed is not conclusive against a review of such question here. (*Columbia Water Power Company* v. *Street Railway Co.*, 172 U. S. 475–488.) But as the validity of no statute, State or Federal, or authority thereunder, was called in question here, this rule does not apply. The true and rational rule stated by this court in *Bridge Proprietors* v. *Hoboken Co.*, (1 Wall. 116–145,) is clearly applicable: "That the court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." This case is the not infrequent one of an attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted.

The Federal question, if any such existed, as to which we express no opinion, was not set up or claimed at the proper time, and the writ of error must, therefore, be dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.